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A SHORT CONSTITUTIONAL HISTORY OF THE UNITED STATES

"The people, then, erected this government. They gave it a constitution, and in that constitution they have enumerated the powers which they bestow on it. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of such powers as are granted, and all others, they declare, are reserved to the states, or the people. But they have not stopped here. If they had they would have accomplished but half their work. No definition can be so clear as to avoid the possibility of doubt; no limitation so precise as to exclude all uncertainty. Who, then, shall construe this grant of the people? Who shall interpret their will, where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding the powers of the government? They have settled all this in the fullest manner. They have left it with the government itself, in its appropriate branches. The very chief end, the main design, for which the whole constitution was framed and adopted, was to establish a government that should not be obliged to act through state agency, or depend on state opinion or state discretion."

WEBSTER, *Reply to Hayne*, January 26, 1830.

UNIVERSITY EDITION

A SHORT CONSTITUTIONAL HISTORY OF THE UNITED STATES

BY

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"A (State) Constitutional History of the American People, 1776–1850,"

"The Constitutional History of the United States, 1765–1895,"

"The Government of the People of the United States,"

etc., etc., etc.

"Those commonwealths have been ever the most durable and perpetual which have often reformed and recomposed themselves according to their first institution and ordinance."

JOHN PYM.

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PREFACE

THE basis of this book is the material consulted in the preparation of the author's larger works,—"A Constitutional History of the American People, 1776–1850," and "The Constitutional History of the United States, 1765–1895,"—the former a narrative of the civil development of the states; the latter, of the federal union.

The present volume narrates the constitutional history both of the Union and of the states, showing the common basis of American local and general government. In a book of small compass, adapted to those who desire the essentials of our civil development, it has seemed sufficient if there were related, (1) the origin of our civil system; (2) the principles on which it is founded; (3) the adaptation of the plan of government to public needs, by amendment and construction; and, (4) the interpretation of the principles of the government by the supreme tribunal,—the courts.

The chapters on the state constitutions treat of a subject too much neglected. A study of the subject quickly reveals its importance. Since 1865 the thought of Americans has turned chiefly to national matters, not

without a distinct decay of interest in commonwealth affairs. Yet it is in the state constitutions adopted since 1865 that one may read the record of serious attempts to adapt the written form of government to the immediate needs of the people.

The Constitution, with citation of cases, printed as an appendix, is taken from the Manual of the Senate of the United States. In addition to a general index to the volume, there is a special index to the Constitution.

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A SHORT
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UNITED STATES

CHAPTER I

UNION

THE civil history of a people is a dual theme, comprehending both the organization and the administration of government. In America, as in other countries in modern times, organization preceded administration; indeed, it constitutes a distinct phase of the civil evolution through which the people of the country have passed. The popular conception of the revolution of 1776 is of a military movement, culminating in American independence, yet the military character of the revolution is its least distinguishing quality. That revolution was essentially civil and industrial, and the economic basis on which it rested proved, under the test of civil experience, to be a constitutional re-organization of the forces of the state. From a military point of view the revolution was a small affair. Not that the continental army or its officers lacked ability, or that the battles, sieges, and fortunes of the war are without grandeur when viewed in the light of results. But the American revolution was not a great military movement such as we contemplate when we follow the fortunes of France under Napoleon, or England under

Marlborough, or, later, the fortunes of the Union and of the Confederacy in the armies of Grant and Lee. The revolution was a great civil adjustment affecting both England and America, and conducing in each country to a clearer understanding of the nature of representative government on a constitutional basis. It is when we examine the revolution as a step in the more perfect organization and administration of government that we approach its true meaning.

But the organization and the administration of government are not the same. If by "government" we mean "the public business" we may easily simplify the theme we would examine. American statesmen of the eighteenth century — the men whom posterity fondly calls the Fathers — were occupied with the organization of representative government. It was the pressing problem of their day, and to its solution they gave an energy and an effectiveness which have enshrined their names in the hearts of all lovers of liberty and justice. Nor did they witness the completion of the great task; it was taken up by their successors, and continued to be the large problem of the American people until after the civil war.

For the evidence of the truth of this declaration we must turn to the history of the American people. The record is open to all men. Americans were the first people to reduce their civil organization to a written form; the first to express the fundamentals of government in a written constitution amendable as the public judgment and the public conscience might demand.

The constitutional history of European peoples centres about some dynasty. The popular will, save perhaps in England, is ever subordinate to the interests of a ruling family. What of privilege or right has been won has been won after long and arduous struggles in which the common people figure as the aggrieved and the aggressor. The constitutional history of European peoples possesses a military quality wholly and happily lacking in America. We record our constitutional development in written laws enacted by the will of the governed. Of administrative law our records are silent because it has never existed among us. We know nothing of edicts or decrees, be-

cause government in America rests not upon a military but a civil foundation.

The constitutional history of America is therefore a history of popular government and of popular government in a dual form, — national and state. Our civil development discloses this form in a familiar aspect as general and local, — whose evolution is recorded, in a large way, in the federal constitution and in the constitutions of the several states. But these constitutions are alike founded upon principles and essentially upon the same principles. We turn therefore to the history of the states as recorded in their successive constitutions for an adequate interpretation of these principles; or, we may turn to the federal constitution itself, in its inception, formation, adoption and later amendment, and, in the examination we discover that though our civil system is dual, state and nation rest on common principles.

In this volume I purpose to narrate the history of that civil evolution which has made America what it is to-day. This narrative is essentially one of principles and the application of principles. It relates how the people of the thirteen colonies became the people of the thirteen states, preserving them in their autonomy yet organizing them in a more perfect union. It relates the struggle out of which sprang the first constitutions of government in our country and later that Constitution which now for more than a century has been recognized as the supreme law of the land. It relates the interpretation which the Fathers gave us of the principles on which our institutions are based. Continuing, the narrative relates how these principles were for many years misunderstood and misapplied, resulting in one of the most terrible civil wars known to history. It relates also the course of that corrective process by which the American people have made provision for the authoritative interpretation of the principles of their government, — by the courts of law, — a process perhaps more refined than any hitherto utilized in human government.

Throughout this narrative I have sought to recognize the fundamental importance of the state constitutions as immediate and responsive exponents of the principles of

government in America. In the state instruments there may be found that closer adjustment ever going on in the republic,—the adaptation of means to ends in government by means of organic law.

It is in these state instruments that we see exemplified the tendencies, from time to time, in civil administration. The entire body of American laws illustrates this process ever going on. Thus it follows that both laws and constitutions of government are records of attempts to adjust the form and the administration of the state to the prevailing spirit of interpretation of civil principles; and we all know that interpretation, like the state itself, is ever changeable, the civil organization being itself in a state of flux.

It is to secure permanency and order that written constitutions are made and laws are enacted. The constitutional history of any people is the record of their efforts to secure this permanency and this order. In America the attempt has taken unto itself a dignity commensurate with the magnitude of the task. No fewer than one hundred and forty written constitutions have been framed, and laws which fill more than four thousand volumes have been enacted for this purpose. Nor is this all. Wars have been waged and thousands of lives have been sacrificed that this purpose may be realized. Nor has the nation lacked strength nor territory for its activities. Republican institutions have here found an ample field. The story is unique in the annals of men. No other people has run a like course. And there is reason for believing that American institutions are yet in their infancy.

The thirteen colonies which revolted against Great Britain were independent each of the other; but the struggle for independence brought them into a new relation which compelled the formation of a union. Until the outbreak of hostilities in 1775 no active steps toward the formation of such a union had been taken. There had been attempts at union in colonial times but all save one ended in failure. The New England union of 1643 was the first and the last league of the colonies. It was a local union; and its small extent, its limited jurisdiction, and its brief existence precluded it from having the force of

a precedent.[1] During the one hundred and thirty years following the formation of this New England league, fourteen different propositions for colonial union emanated from various quarters, — some English, some American,[2] — but none of these propositions was more than a scheme on paper. Those of English origin were monarchical in character and based on the theory that the English colonies in America should be united in a federal government on a military basis.

The plans of American origin were more liberal and proposed a federal government on a popular basis, the essential element of which was the colonial assembly. This body was recognized as the representative of the people. In the proposed leagues of American origin the assemblies were to choose delegates to a colonial congress, but its powers were not closely defined. The vital characteristic of the American propositions was their latent democracy. The power to levy taxes was acknowledged by them to reside in the assemblies. English and American plans were alike in providing for a captain-general, who should be sent out to the colonies by the crown; whose authority should be supreme in America, though subordinate to that of the crown, and whose compensation should be paid by the colonies.

The nearest approach to colonial confederation was made at Albany in 1754. The plans there proposed agreed in providing for a military executive, but differed in their provision for the legislature. Of these plans, that submitted by Dr. Franklin is best known. It avoided extremes by proposing a colonial legislature, which should control taxation; and an executive, appointed by the

[1] It consisted of Massachusetts, New Plymouth, Connecticut, and New Haven, and was in force forty years. Its jurisdiction was limited and chiefly for military purposes. It was distinctively an ecclesiastical union. For the text of the articles of union, see Preston, p. 85. For an account of all the unions proposed during colonial times, see the author's "Constitutional History of the United States," vol. i, pp. 166–215. For the relation of New Hampshire to the Union, see A. S. Batchellor's "Government and Laws of New Hampshire before the Establishment of the Province, 1623–1679." Manchester, N. H., 1904.

[2] For an account of these plans, see the author's "Constitutional History of the United States, 1765–1895," vol. i, pp. 185–213.

crown, who should be practically independent of the legislature. As a scheme for colonial federation it was admirable, but it failed because the trend of affairs, obscure in 1754, was toward the formation of a new nation and an independent government.

One of the chief causes of American independence was the attempt of Parliament to establish a military type of government in America. The controversy over the Stamp Act, passed in 1765, and all that that controversy implied, culminated in the call for an American congress, first sent out by Massachusetts on July 25th of that year. The response was immediate and favorable. On the 19th of October of that year delegates from nine colonies met in New York City and organized as a continental congress.[1] This meeting, strictly speaking, was a convention. The delegates had no authority to legislate, but only to confer together on the condition of the country. Each colony present was allowed one vote in the proceedings of the congress, and thus early was recognized the autonomy of each colony, — soon to become a state. The recognition was the germ of state sovereignty.

The congress was in session three weeks. On the 25th of October it sent forth a declaration of rights which stated the claims and grievances of the colonies and their understanding of the principles of government. This declaration was the parent of innumerable declarations of the rights and privileges of the American people. Yet upon close investigation it will be found that the celebrated declaration of 1765 was not wholly new. Rather was it a compilation of earlier statements and declarations of like nature which had been made at various times by colonial assemblies. The New York congress gathered up these declarations and expressed them in general form, — a statement of the epoch-making doctrine of the natural rights of men.

This doctrine ran contrary to the accepted legal interpretation of the foundation of government: namely, that it is a grant from the crown, and marked a departure in

[1] Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey, Maryland, Delaware, and South Carolina.

the theory of government which henceforth should be conceived as resting upon the natural rights of all men instead of upon the privileged rights of a few. Though departing thus radically from precedents in its statement of the theory of government, the congress maintained the old doctrine of allegiance to the crown. But it made a clear disclaimer of the constitutional right of Parliament to tax America without its consent. "The right to tax," so it was declared, "resides only in the local assemblies." For obvious reasons the colonies could not be represented in Parliament. The distance between England and America was too great to make representation practicable. The declaration concluded with a claim, for the Americans, to all the ancient and undoubted rights of Englishmen.

Parliament discovered that the Stamp Act could not be executed in America without violence; but this act was not the only one of which the Americans complained: two others, known as the Townshend acts, both passed for the purpose of raising revenue in America, were equally unpopular.[1] After a long and bitter debate Parliament repealed the Stamp Act,[2] but at the same time declared its right to tax the colonies. The news of the repeal was received in America with every manifestation of joy; but joy turned to sorrow at the later news, that Parliament had levied a tax, though trifling in amount, on tea and on a few other articles, not so much for the purpose of revenue as to assert the right of taxation. In asserting this right, Parliament raised the issue which ultimately lost England the thirteen colonies.

In February, 1768, Massachusetts again invited the colonies to confer and co-operate, addressing her circular letter to the speakers of the assemblies in which she boldly asserted that the rights of America must be defended. The Massachusetts letter was welcomed by every assembly. The several colonies were already in a revolutionary state. In the royal colonies the assemblies boldly ignored the governor, — the representative of the crown,

[1] For an account of them, see Trevelyan's "American Revolution," part i, chap. ii.

[2] March 7, 1766.

— or circumvented him by organizing as a provincial congress, which elected delegates to the general congress. This assembled in Philadelphia.[1] Fifty-five delegates, representing together all the colonies except Georgia, were in attendance. Some were chosen by the assemblies, some by county committees assembled in convention, others by provincial congresses. Thus apparently their authority was not equal, but upon assembling, the credentials of all were accepted, and the congress began its work.

This second congress differed widely from that of 1765 in that the purpose of its greeting was more specific and the credentials of its delegates essentially more representative of the sentiment of the country. The idea of union was becoming universal; the revolution had progressed into a more positive stage. The time had come for taking steps toward the formation of a national government: independence was at hand. The instructions to the delegates varied, but every commission either expressed or implied the popular will that the congress should consider the unnecessary restraints and burdens on trade which the late acts of Parliament had imposed, and procure a redress of grievances. Here, it will be observed, was a two-fold duty: partly political, partly economic.

The congress had been in session three weeks when Galloway, a Pennsylvania member, submitted a plan of union, the most important provisions of which were those for the appointment of a captain-general by the crown, and the election of a congress by the assemblies. The plan was briefly discussed, but soon recognized as antagonistic to popular government, and later was expunged from the journal. Its fate plainly showed that American union could not be formed upon a monarchical basis. Meanwhile a number of committees had reported. The committee on the rights of the colonies reiterated the substance of the famous English bill of rights of 1689, and of the declaration of rights made by the congress in 1765. It however went further than the last named declaration by claiming that American rights were not only natural

[1] September 5, 1774.

but constitutional; that is, incident and necessary to the plan of government under which English people were living.

The report of the committee on trade and manufactures was of an entirely different order, for it involved not merely the theory but the administration of government. It constituted the basis of that celebrated agreement known as the solemn league and covenant, the Association of 1774. By this it was agreed that a policy of non-importation and non-consumption of English goods, and of non-exportation to Great Britain, should be followed. All trade with Great Britain and her colonies should cease after December 1, 1775. Agriculture, the arts and manufactures should be encouraged. The slave trade too should cease. This agreement was an economic event of the highest importance. It was the first great act in the formation of the American Union. Many years later it was spoken of by President Lincoln as "the parent of the Union"; and President John Adams described it as "the first expression of the sovereign will of a free nation in America." Of the many declarations which this congress sent forth, this of the industrial rights of America made clear the real causes of the revolution. The time had come when the colonies were self-supporting and fully able to assume the duties and responsibilities of nationality. This was the real significance of the association of 1774.

The congress of 1774 was a reform convention, called solely to consider the best means of redressing public grievances. Its members had no thought of American independence. The majority of them had little doubt that the causes of the evils of which the country was complaining would be removed. They knew very well that under English rule the colonies were prospering and, if they were at all familiar with history, they must have known that in their safety, freedom, and happiness the American people at this time had more to be thankful for than any other colonial people in ancient or modern times. But events were swiftly moving toward a very different conclusion than that which the majority of the delegates were anticipating. They adjourned on the 26th of October to

meet again on the 10th of May, 1775, unless, meanwhile, the public grievances of which they complained should be redressed by Parliament.

The 10th of May came and the congress again assembled. The ministry had not made concessions; rather, the prospect was of the enactment of a series of laws all in the spirit of the tea tax. Lord North's policy of conciliation, framed early in 1775, did not abandon the claim of right to tax the colonies; it left the matter wholly at the discretion of Parliament. Most of the delegates were returned to Congress, and all the colonies, save Georgia, were represented. Since the last meeting, military affairs in New England had reached such a stage that reconciliation with the British government was practically impossible. The time had come when the test must be made whether the monarchical or the democratic idea of government should prevail in America. The delegates clearly understood the issue and proceeded to define it in a series of remarkable acts. Their efforts to persuade the people of Canada to join with them failed, as likewise did their attempts to conciliate Parliament, the King, and the English people. But their appeal to America aroused the sentiment of union: it awakened a new nation. The time had come for the colonies to become states, and Congress took the initiative by urging the change. Within two years all the colonies organized state governments under written constitutions.[1]

A series of measures was now adopted; some of a civil, others of a military nature. By this congress a beginning was made of the Departments of War, Navy, State, and the Post-Office. Washington was chosen commander-in-chief, and the militia encamped near Boston, and organized in other parts of the Union, were adopted as the continental army. The Congress acted as the representative of the united colonies of America, but as yet no distinctive national name was used. Undoubtedly the delegates acted fully up to their authority. They had not been empowered to levy taxes or to declare war, but their acts necessitated the imposition of taxes and the preparation for war. The delegates assumed that they had the

[1] For an account of them, see chap. v.

sanction of public opinion, and acted as a representative, federal body. Thus, on the 22d of June they ordered the emission of bills of credit to the amount of two millions of Spanish dollars for the defence of America, and to the redemption of these bills of credit pledged the credit of the colonies represented. This was a federal act of the highest importance, and the roots of its authority ran deep into the foundations of American union.

On the 13th of September, 1775, Congress reassembled, after a six weeks' adjournment, in full possession of evidence of popular sanction of its acts. All its appeals and protests to the King, to Parliament, and to the English people had been in vain. The true condition of affairs was more perfectly realized by the delegates than before; men were talking of continental interests, of a continental congress, and of independence. Early in 1776 Thomas Paine had urged independence in *Common Sense*, — one of the most famous of political pamphlets. From hundreds of town meetings, from county conventions, and from committees of correspondence, active all over the land, was now heard the demand for independence, — but Congress hesitated; the step was perilous, and for reasons of expediency the members delayed a declaration of independence. New England and the South were sure, but the Middle Colonies were yet doubtful. Independence must be the act of a united America.

On the 15th of May, 1776, Virginia instructed its delegates to recommend to Congress the adoption of a declaration of American independence, and on the 7th of June, Richard Henry Lee, of Virginia, chosen by his colleagues to move the resolution, formally proposed the resolution, which was seconded by John Adams, of Massachusetts, that "These united colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British crown and that all political connection between them and the state of Great Britain is and ought to be utterly dissolved." Four days later Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston were appointed a committee to prepare a declaration of independence. On this day another committee was appointed

to prepare Articles of Confederation. Jefferson's committee reported on the 1st of July, and two days later its report, somewhat amended during debate, was adopted. On the 4th of July the draft of the Declaration of Independence was engrossed and proclaimed to the world.

Meanwhile the committee appointed to prepare Articles of Confederation drew up a plan of government,[1] and submitted it to Congress on the 12th of July, through John Dickinson, its chairman. His report followed closely a plan of union [2] which had been submitted to Congress by Dr. Franklin on the 12th of July of the preceding year. As the first serious attempt to embody the principles of American union, Dickinson's revision of Franklin's sketch is of great interest. It discloses the ideas which prevailed at the time of the revolution respecting the relation of the states to each other, and to any general government which might be formed; and it also discloses what the founders of our national government conceived were its essential qualities.

Dickinson's plan recognized the independence and sovereignty of each state, but at the same time prescribed limitations on the states, — a contradiction as to sovereignty which ran through the whole system. This contradiction was the result of the attempt of the plan to divide sovereignty, asserting, by implication, general sovereignty in the Confederation, and residuary sovereignty in each of the states. The division is unphilosophical, but the doctrine of residuary sovereignty has been repeatedly affirmed by the supreme court of the United States.[3] The limitations prescribed for the states were a clear invasion of their sovereignty, and tended to develop in the public mind the germs of the idea of national sovereignty.[4] But the fundamental idea of the Articles was of a plan of government by which every power, jurisdiction, and right which was not expressly delegated to the United States

[1] Elliot, vol. v, p. 110.

[2] Franklin's Works (Bigelow's Edition), vol. i, p. 243; vol. ii, p. 343; vol. v, p. 548.

[3] A typical presentation of this doctrine is Texas *v.* White, 7 Wallace, 700 (1868). The doctrine is explicitly stated in "The Federalist," (Lodge's Edition), Nos. XXXII, LXXXI.

[4] See Articles of Confederation (Bigelow's Franklin), vol. v.

was retained by the states individually.[1] The administrative details of Dickinson's plan were taken almost wholly from Franklin's sketch. The exclusive rights of the United States enumerated [2] were characteristic of a sovereign power. The chief limit on the United States related to the power of taxation and the fixing of the revenue. In these and in several other particulars no steps could be taken without the consent of nine states, a condition which tied the hands of the new government. The Articles were to be submitted to the assemblies for ratification, a clear recognition of the potency of the residuary sovereignty of the states.

On July 22, 1776, Dickinson's report was taken up by Congress, and was debated, at times, until the 20th of August, when a new draft was reported, styled "Articles of Confederation and Perpetual Union between the States." In Dickinson's first draft the term "colonies" had been used. The revised plan was debated in Congress at irregular intervals during the following year, and many amendments were proposed. The most interesting discussion was of the basis and apportionment of representation, a subject which brought up the institution,—slavery. Finally a compromise was agreed to: that five slaves should be counted as three freemen, a settlement which came to be known as "the federal number," the three-fifths, or federal ratio. It was also decided, though not as a compromise, that each state in the confederation should have one vote in Congress.[3]

On November 15, 1777, the Articles as amended in debate were adopted by Congress, and two days later were sent to the assemblies for ratification. During the following seven months the assemblies discussed them and proposed many amendments, none of which Congress approved.

The principal difficulty in the way of securing ratification of the Articles was the western lands. All the states, except Rhode Island, New Jersey, Delaware, and Mary-

[1] See Articles of Confederation (Bigelow's Franklin), vol. ii.

[2] Article IX.

[3] For an account of the debate on the Articles, see the author's "Constitutional History of the United States, 1765–1895," vol. i, pp. 220–233.

land, made some claims to lands lying directly to the west. The area in dispute extended from the present western boundary of New York, Pennsylvania, Maryland, Virginia, the Carolinas, and Georgia, to the Mississippi. Maryland, New Jersey, and Delaware demanded that this area should be surrendered to the United States by the states claiming it, and from its sale a fund be created for the use of the general government. The states having no western land plainly intimated that they would not ratify the Articles unless the cession was made. The response of the states was speedy and generous. In 1780 New York ceded to the general government all its claim to western lands and Connecticut in the same year indicated her willingness to make a like cession. There was every evidence that Virginia would follow their example. Assured now of the ultimate cession of the western lands to the general government, Maryland, the last state to act on the Articles, authorized her delegates in Congress to sign them, and their signatures, affixed on March 1, 1781, completed the work of ratification. On the following day Congress met for the first time under the Articles, which to all intents and purposes were a national constitution.

The Articles were in process of formation and ratification nearly five years, during which time their defects as a plan of government had been, in a measure, realized. "The great and radical vice in the construction of the existing confederation," wrote Alexander Hamilton,[1] "is in the principle of legislation for the states, or governments, in their corporate or collective capacities, and as contra-distinguished from the individuals of which they consist. Though this principle does not run through all the powers delegated to the union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of appointment, the United States has an indefinite discretion to make requisition for men and money; but they have no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws,

[1] "The Federalist," No. XVI.

constitutionally binding on members of the union, yet in practice they are mere recommendations which the states observe or disregard at their option."

This was written in 1787, after six years' trial of the Articles, and it states briefly but comprehensively the essential defect of the political system which they embodied. The "great and radical vice" which Hamilton thus pointed out in a negative way he made clearer. "The government of the union," wrote he, "like that of each state, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means and have a right to resort to all the methods of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular states." [1]

Under the test of administration, the Articles in the short period of five years proved wholly inadequate to the exigencies of the union. The government which they established did not possess the means, or have the right to resort to all the methods of executing the powers with which it was intrusted, that were possessed and exercised by the government of the particular states; it was dependent upon the states for the execution of its laws. It could not appeal to the individual citizens of the United States, save indirectly through the state legislatures. As long as the states responded promptly and willingly to the support of its acts, the congress of the Confederation was a directing, if not a governing body; but by 1785 there was evidence on every hand not only that the political system at the head of which the congress nominally stood was wholly inadequate, and that if the purposes for which the Union had been formed were to be realized, the Articles of Confederation must be amended.

The crisis came in 1786, when the states finally refused to grant Congress the power to pass a tariff act. This signified that the trade and commerce of the country were to be regulated by thirteen individual states, a condition

[1] "The Federalist," No. XVI.

of affairs which necessarily must involve the country in industrial ruin. As early as 1780, and nearly a year before the ratification of the Articles, Hamilton had urged the calling of a federal convention, to amend them. Six years had passed, and the political and industrial history of the country had fully confirmed the fears of Hamilton, and of other friends and supporters of the Union, that the incurable fault of the Confederation was its recognition of the sovereignty of each state.

Congress itself, after 1784, was convinced that constitutional reforms were important, but its suggestions received little attention. The most serious evil of the times was the repeated practical denial of the obligation of contracts, as exemplified in the enormous issue of paper money by Congress and by the states. Repeated attempts were made, as in Rhode Island, to enforce the circulation of state paper, at par, by law. The effect of this wholesale issue of fiat money was the prostration of public and private credit. Scarcely less serious was another evil, — commercial rivalry among the states.

In 1786 Maryland and Virginia appointed commissioners to prepare articles of agreement respecting the control of commerce on the Potomac; but other states were interested in the great subject of inter-state commerce, and some of them were in favor of giving to Congress the exclusive power of regulating it. The Virginia and Maryland commissioners recognized the interests of Delaware and Pennsylvania in the Potomac, and prepared a letter to all the assemblies urging the assembling of a trade convention to which every state should send delegates. To this suggestion five states responded,[1] by sending delegates to Annapolis, Maryland, to confer together on the subject of inter-state commerce and the regulation of trade. After a three days' session they agreed upon a report, written by Alexander Hamilton, which was sent to Congress and the state legislatures. The report was, in substance, a review of the defects of the Articles, and concluded with the suggestion that as the subject was of general interest, each state should

[1] Virginia, New York, New Jersey, Pennsylvania, and Delaware.

appoint delegates to a federal convention, which should consider what should be done to render the federal constitution "adequate to the exigencies of the Union." Philadelphia was named as the place of meeting, and the 10th of May, 1787, as the time.

To this suggestion all the states, except Rhode Island, responded during the next six months, by the appointment of delegates. On the 21st of February, 1787, Congress gave its tardy consent to the call for the convention. Its decision and that of several of the states was hastened by an insurrection which broke out in Massachusetts, known as "Shays's rebellion," caused by the prostration of public and private credit, by the disturbance of industry, and by the riotous growth of loose notions of government, engendered by ultra revolutionary notions. The outbreak was recognized at the time as an unmistakable sign of the critical condition of public affairs. The insurrection lasted four months. Taken in connection with the low state of public credit, the depression of trade, the feebleness of the federal government, and the jealousy prevailing among the states, this "commotion among the eastern people," as Washington called it, placed our national character "much below par, and brought our politics and credit to the brink of a precipice." The willingness of the states and of Congress to consider constitutional reforms was, as John Adams expressed it, the result of grinding necessity. A federal convention seemed the only means of escape from anarchy.[1]

[1] For a detailed account of the condition of the states under the Articles of Confederation, of the failure of the confederation, and of the necessity of constitutional reforms, see the author's "Constitutional History of the United States, 1776–1895," vol. i, pp. 208–288.

CHAPTER II

FORMULATION OF THE SUPREME LAW

DURING the fall and winter of 1786–1787 the legislatures of the states, except Rhode Island, elected in the aggregate seventy-four delegates to the Philadelphia convention, and of these fifty-five accepted election. On Friday, the 25th of May, 1787, the business of the convention opened with the unanimous choice of Washington as presiding officer. The sessions continued for three months with few interruptions. The delegates met with closed doors, and under the rule "that nothing spoken in the house be printed, or otherwise published, or communicated, without leave." They composed the most distinguished body of Americans who have assembled at one time for any purpose.

The Virginia delegates had arrived some days before the actual work of the convention began. James Madison, one of these delegates, had thoroughly acquainted himself with the history of confederacies, and came to Philadelphia with a carefully prepared outline of a general government. This outline, known as the Virginia plan, consisted of fifteen resolutions, and was submitted to the convention on the 19th of May, by Edmund Randolph, governor of Virginia, and one of the delegates from that state.

The plan called for a radical remodelling of the Articles in conformity to the republican basis of the state governments. Congress had consisted of a single house; the Virginia plan called for a national legislature of two branches: the lower chosen by the people, the upper indirectly by the assemblies. The Confederation made no provision for a chief executive; the Virginia plan proposed a national executive to be chosen by the national

legislature. The Articles made no provision for federal courts; the Virginia plan proposed a national judiciary, consisting of one superior tribunal and of inferior tribunals. These general provisions indicate the comprehensive scope of the plan; its details partook of a like quality. In brief, a national government should be established consisting of a supreme legislative, executive, and judiciary.

The word "national" indicated the essential character of the proposed reform, and at once divided the convention into two parties, — the state party and the national party. The state party feared the formation of a consolidated government, and desired only to amend the Articles so as to secure a strictly federal government. This fundamental difference between the two parties occasioned the long debate out of which grew the Constitution of the United States.

A government organized strictly on a national basis would address itself primarily to individuals; therefore representation in both houses would be apportioned according to population, and the executive would be chosen by popular vote. An elective judiciary was at this time unknown. In each state, as in England, at this time, the judges were appointed by the executive, with the consent of the upper house.[1] In a strictly national government, authority, legislative, executive, and judicial would be supreme, and the authority of the several states would be in every respect subordinate.

If the government was organized strictly on a federal basis, the states, as independent and sovereign bodies, would lie at its foundation. It would rest upon them as distinct corporations, and would have no authority over individuals. The federal legislature might consist of a single branch in which, as under the articles, each state might have one vote. Representation, therefore, would be equal but not proportional. The executive in such a government would be chosen either by the state legislatures, or by the representatives of these legislatures in Congress. The federal judiciary might consist of the state tribunals.

[1] Excepting in Pennsylvania, Georgia, and Vermont the legislature consisted of two branches.

If it consisted of distinct tribunals, their jurisdiction would not extend over that of the state courts. In a strictly federal government authority would be limited, would be expressly delegated, and would never be superior to that of the respective states.

On the morning of May 29th, Randolph, in an effective speech, reviewed the Articles of Confederation, pointed out their defects, and urged his colleagues to remedy them by the organization of a national government. To this end he submitted the fifteen resolutions which comprised the Virginia plan.

There should be a national executive, a national legislature, a national judiciary, and a council of revision. The national legislature should elect the executive, but he should be ineligible for a second term. The legislature should consist of two houses, and should have power to veto all acts of assembly in conflict with the constitution, and also should have power to coerce refractory states. The lower house should be chosen by the people, but the upper house should be chosen by the lower house from men nominated by the state legislatures. Representation in both houses should be proportional to population, or to the contributions made by the several states to the general expense. The national legislature should elect a national judiciary. The council of revision should consist of the executive and the judges, and its duty should be to revise the laws before they went into effect. New states should be admitted into the Union; the Constitution should be subject to amendment, and each state should be guaranteed a republican form of government.

After his running commentary on the resolutions, Randolph handed them over to the convention, which at once went into committee of the whole on the state of the Union. General Charles Pinckney, of South Carolina, then submitted a plan of which little is known.[1] It also was given over to the committee. For two weeks the Vir-

[1] For a copy of Pinckney's draft, together with some critical remarks by Prof. J. Franklin Jameson, see the *American Historical Review* for April, 1903. Madison's well known estimate may be found in his "Notes" on the convention. See also Professor Jameson's "Studies in the History of the Federal Convention of 1787," and "Report of the American Historical Association, 1902," vol. i, pp. 89–167.

ginia plan was debated, article by article. Many amendments were suggested and a few were adopted. All the delegates agreed that the old Articles were inadequate, but they differed widely as to the best manner of correcting their defects. There was a prevailing sentiment, however, that the three-fold division of government familiar to the states should prevail in the national plan; that the national legislature should consist of two houses, like most of the state legislatures, and that the lower house should be chosen by the people. But as soon as these broad outlines of the new plan were taken up in detail, almost hopeless differences of opinion at once appeared.

The majority were jealous for the preservation of all the powers of the states, and formed what may be called the state party. They favored a plural executive; and some wished an executive committee of three persons, each from a different section of the country. The colonial executives had been aided by a council, and the state party now demanded a council of revision. Some favored the election of the executive directly by the people; others, an election by the state legislatures; others, an election by both branches of the national legislature, and others an election by the governors. Out of this confusion came the decision, on the 4th of June, that the election of the executive should be determined by the national legislature, but that he should not be re-eligible after his term of six years.

Up to the time of this decision the discussion appears to have been friendly; but the apparently irreconcilable opinions of the members now led them into hostile speech, and it seemed to some that the convention must adjourn, having done nothing. Amidst all the differences of the hour, it was evident that there were two principal parties in the convention: one, the state party, demanding a strictly federal government; the other, the national party which would, if possible, set up a strongly centralized government. Yet even thus early in the discussion the distinctive character of the North and the South appeared. The northern states were commercial; the southern, agricultural. Another difficulty which intensified differences was the division of the states into large and small; the

three largest in wealth and population being Virginia, Pennsylvania, and Massachusetts.

While the provision in the Virginia plan on representation was under discussion, it became evident that slavery would force yet another division in the convention. The pro-slavery party demanded the equal representation of slaves; their opponents demanded the exclusion of slaves from representation. Out of these differences of opinion grew the three great compromises of the Constitution: the first on representation, — the compromise between the large and the small states; the second on slavery, — the compromise on the representation of slaves, caused by the contest between the free states and the slave states; and the third, the compromise on the regulation of commerce and the slave trade, caused by the contest between the commercial and the agricultural states.

The great states earnestly supported the Virginia plan; the small states, with equal vehemence, demanded amendment of the old Articles. The issue was clearly drawn by the 9th of June, when at the request of William Paterson, of New Jersey, who spoke for the small states, the question of proportional representation was taken up. He and his party believed that the convention in presuming to make a new constitution was transcending its powers. Its duty was to amend the old Articles. These recognized the sovereignty of the states by allowing each an equal vote in Congress. Proportional representation, whether as to wealth or population, he said, was unjust to the smaller states. Georgia would have but one representative, Virginia would have sixteen; the risk was too great; and he boldly declared that New Jersey would never join in such a plan.

In vain did the spokesmen of the national party, and notably Wilson and Madison, defend proportional representation for both Houses. They could not persuade the convention that a state could preserve its sovereignty, and at the same time be a member of such a national government as they proposed. And they could not persuade the state party that it was the people and not the states that were to be represented in the new government. But the delegates from the large states were in the majority, and

decided that representation in the lower House should be according to some equitable ratio, and this, it was soon decided, should be the ratio adopted by Congress in April, 1783, for determining the quotas of the several states; that is, according to the whole number of free white persons, and three-fifths of all other persons, excepting Indians, not taxed. The small states, thus defeated in their struggle to secure equal representation in the lower House, now strove vigorously to secure it in the upper; but they were out-voted by the larger states, and representation here, it was decided, should also be according to population. There was less difference of opinion respecting the remaining clauses of the Virginia plan, and by the 13th of June all its resolutions had been discussed, and the convention was ready to hear the final report of the committee of the whole.

But the smaller states were not merely dissatisfied; they were seriously thinking of retiring from the convention. Their delegates now met and outlined a plan which they placed in the hands of Paterson to present to the convention.[1] Known as the New Jersey plan, it was federal in character. Congress should consist, as formerly, of one branch, but should have power to regulate trade and to levy taxes. The executive should consist of several persons, each chosen for one term only, and removable by Congress whenever a majority of the governors should make the demand. The plan made a provision for a supreme court, and for a system of requisitions on the states similar to that in the articles of confederation. Paterson defended the plan as coming within the powers of the convention, and as likely to prove popular because similar to that of the articles. Either the convention must restrict itself to amending the articles, he said, or the delegates must go home and receive authority to substitute a new constitution for them.

The small states had now taken a stand from which they plainly intimated they would not recede. The large

[1] See "Papers of William Paterson on the Federal Convention, 1787," *American Historical Review*, January, 1904.

states, which had controlled the convention thus far, were not dismayed, but proceeded to attack the New Jersey plan. James Wilson, of Pennsylvania, made a close comparison between the Virginia and the New Jersey plans. By the Virginia plan, said he, the basis of the government would be the people; but by the New Jersey plan the basis would be the states. By the Virginia plan the rule would be the rule of the majority, but by the New Jersey plan it would be of the minority. The country would have a single executive by the Virginia plan, but, by the New Jersey plan, several executives. By the Virginia plan the new government would consist of the three branches familiar to the people in their state governments; by the New Jersey plan there would be but one branch. By the Virginia plan the government would have the power to annul acts of the assemblies; by the New Jersey plan it would be authorized to coerce the states.

James Madison followed Wilson in a powerful speech, in which he pointed out that the New Jersey plan did not differ essentially from the old Articles of Confederation; therefore, the old evils would continue, and the people would be no better off than before.

Wilson and Madison were followed by Alexander Hamilton, who, in a remarkable speech, criticised both plans as inadequate to the wants of the country, and then he outlined a government on a strictly national basis: a supreme legislative consisting of two Houses; members of the lower House chosen by the people for three years, and members of the upper House chosen for good behavior by electors elected by the people. The executive, also chosen for good behavior, should be elected by special electors; should have authority to veto all laws; to make treaties with the co-operation of the Senate; to appoint the heads of departments, and to carry on war whenever declared. The national judiciary should be supreme in all matters of general concern which came before it. All acts of state legislatures violating the constitution and the laws of the United States should be null and void. The governors of the states should be appointed by the national government. Hamilton did not submit a detailed plan of government; he merely sketched what

he considered the scope and general organization of a national system.[1]

The question now before the convention was which plan to adopt, — the Virginia or the New Jersey. The large states, still controlling the convention, were intent on securing a strong national government, and the committee of the whole reported the Virginia plan. For a few days the business ran on smoothly and minor changes were made in the plan so as to conciliate the small states, and particularly by omitting the word "national," which occurred twenty-six times in the amended Virginia resolutions. It was dropped for the phrase, "government of the United States," or its equivalent. During the greater part of June, the discussion was of the organization of the legislature, whether of one or two branches; of the composition of the executive, whether of one person or more; and of the qualifications and terms of members of Congress. But there was one question which seemed beyond power of settlement: the basis of representation in the national legislature. Should it be proportional as the large states now demanded, or one of state equality, as in the Articles of Confederation? On this issue the debate became angry.

The state party elaborated the doctrine of state sovereignty. If proportional representation was to prevail, the sovereignty of the small states, they said, would be endangered. In vain did the national party attempt to prove these fears groundless. In vain did they argue that there was less danger of combination between the great than between the small states. What had the great states in common, they inquired, and what evidence existed of the possibility of combination among them?

Happily, just at this time, there appeared a third party, led by Roger Sherman of Connecticut, who detected the opportunity for a compromise. Between the national party and the state party he declared there was a middle ground; the states should not be ignored in the organization of the new government; they should compose

[1] For the draft of Hamilton's plan, see "Report of the American Historical Association, 1902," vol. i, pp. 143–150.

an essential part of its basis. The new government must consider both states and individuals; therefore, both the states as corporations and the people as individuals should be represented: the one in one branch of Congress, the other in the other branch. But Sherman's proposition did not please the small states, and they would have none of it. The great states, whose delegates were now becoming a little impatient at the stubbornness of Paterson and his supporters, would not modify their decision, and it was settled that the representation in the lower House of the national legislature should be proportional to population. This also pleased Sherman and his party of compromisers.

It now remained for them to secure equal representation of the states in the upper house. Here they antagonized the supporters of the Virginia plan, some of whom lost their tempers at thought of the demand. A vote was taken: it stood five to five, — a tie. The disruption of the convention seemed imminent. At this moment Charles Cotesworth Pinckney, of South Carolina, moved that the question of representation be handed over to a grand committee and that the convention should adjourn for three days. A grand committee of eleven was elected and the crisis passed.

But the grand committee was as divided over the question as the convention had been, and rejected the proposed compromise. There seemed no prospect of conciliation or agreement. Members of the committee, who were of the state party, re-affirmed their fears and declared that they would never confederate on the plan suggested by Sherman. Dr. Franklin, who was a member of the committee, at last secured harmony and persuaded his colleagues to unite in a report. It was understood, however, that the report was not binding upon any member of the committee, and therefore, he might support or attack it as he chose on the floor of the convention. Franklin went further than Sherman, as the report shows. In the lower House, each state should have one representative for every forty thousand inhabitants, and in the upper House an equal vote. To win the great states it was agreed that the lower

House should have the exclusive right to originate money bills, though these might be amended in the upper House. For two weeks the report was discussed. At last it was adopted, and thus the great compromise on representation was made.

It was difficult, but less difficult, to agree on the details of representation. Much was said of the size of each House. There was fear that new states in the West might soon outvote old states in the East, if the basis of apportionment was too small. But Madison and a few other broad-minded members successfully urged a generous provision for the future, and warned the convention against any discrimination between the East and the West. It was necessary, however, to establish some rule of apportionment and to this end Randolph suggested a census. The idea was favorably received, but it was soon discovered that it involved difficulties. How should the slaves, most of whom were found south of Mason and Dixon's line, be computed? Should they be counted as persons or as property? The question divided the convention.

The southern delegates and some of the northern demanded that slaves should rank as free persons. The opponents of slavery answered that slaves were property and for that reason the oxen and cattle of the North should be included in the census. At this moment Hugh Williamson, of North Carolina, came forward with a compromise : the enumeration in the census should be of all free persons and three-fifths of all others; but his compromise provoked a heated discussion. Massachusetts, New Jersey and Pennsylvania demanded the exclusion of slaves; Georgia, South Carolina, and Delaware insisted upon their representation equally with white men. North Carolina, Virginia, and Maryland, though slave-holding states, favored the northern idea.

In the debate which followed, the importance of slavery to the South was fully set forth by its leading delegates. The opponents of slave representation objected to it because of its encouragement to the slave trade and here the matter was left, — for by a unanimous vote Randolph's motion for a census was rejected.

At this point Gouverneur Morris, of Pennsylvania, proposed that taxation should be in proportion to representation, which was agreed to with the understanding that direct taxation was understood; but if property was to be taxed, and slaves were property, then the South would bear a heavy burden; and several of its delegates at once declared that the South would never join in the union unless it was granted a representation of three-fifths of its slaves, — from which position the southern delegates could not be driven. While it was possible that their request might be voted down, the effect was not in doubt; the slave-holding states would reject the plan when submitted to them, therefore the demands of the South must be granted or a compromise of some kind be arranged.

Rhode Island had not sent delegates. New York, in the persons of Yates and Lansing, had retired from the convention when Sherman's compromise on representation was carried; and of the ten states remaining six were southern. To win the support of the South to the new plan, the propositions for a census and representation of three-fifths of the slaves were renewed, and through the skilful management of Gouverneur Morris a compromise was agreed on: that representation should be according to direct taxation, and that both direct taxes and representation should be apportioned according to population, and by the term "population" should be understood all free white persons and three-fifths of the slaves. The vote of North Carolina and Georgia carried the propositions, and the compromise on slave representation was made.

The two compromises were reported to the convention by the committee on the 16th of July; the decision about to be made would determine the fate of the new plan. The managers sagaciously united the two compromises so that the vote must be on the whole report. This strengthened its chances of success, for the small states desired the equal representation which they would secure in the upper house; and the slave states desired the slave representation which they would secure by the second part of the report. As the vote proceeded, it was discovered

that the fate of the two compromises would depend upon the vote of North Carolina. It voted *yea*, and the compromises were carried. The victory did not, however, restore harmony to the convention; scarcely a member was satisfied. There were louder hints than before of immediate adjournment and another federal convention, but all ended in talk.

Ten days were then spent in agreeing on the details of the distribution of power between the general government and the states. Then, on the 26th of July, the Virginia plan, which had expanded into twenty-three provisions, the New Jersey plan, and Pinckney's plan were handed over to a grand committee which was instructed to report a constitution. An adjournment was then taken till the 6th of August.

It was during these eleven days that the Constitution or plan of government of the United States was given its first form. When the convention re-assembled, each member was supplied with a printed draft of a constitution of which a few copies are in existence. The twenty-three resolutions submitted by the committee show at a glance the great changes which its members had made in the plan. The executive should serve one term of seven years, and could never again be a candidate for the office. His title should be His Excellency. He should be impeachable by the House of Representatives, but should be tried before the supreme court. The states should pay the members of the national legislature. A senator could hold no office under the United States till one year after his retirement from the Senate. The committee also reported a cumbersome method of settling disputes between states.

The delegates now settled down to a careful revision of the committee's report. Matters went on smoothly until the article was reached forbidding Congress to levy an export tax, or to impose a tax on imported slaves, or in any way to hinder the slave trade; or to pass a tariff law except with the consent of two-thirds of the members present in each House. Not to tax exports was a novel idea, and was objected to by some of the southern members, who feared that if this power was denied to the general government, it would be exercised by the states,

and thus the agricultural would be brought under the control of the commercial states. Until this time every government on earth had taxed exports. The sound doctrines of Adam Smith and his school were now for the first time having their effect in organic legislation, and the ancient practice was for the first time discarded.

South Carolina and Georgia were the slave importing states, and to please them the provision protecting the slave trade had been inserted. They insisted that their prosperity depended upon the abundance of slave labor which, according to their account, implied the free importation of slaves. The idea, however, was repugnant to many delegates, and Luther Martin, of Maryland, proposed that the importation of slaves should be taxed. This brought the matter to an issue, and precipitated a long and somewhat bitter discussion. Free states and slave states were contrasted in wealth and progress, and religion and morality as touching slavery were discussed. There seemed no way of settling the matter till Gouverneur Morris suggested that the questions of taxing imported slaves, of taxing exports, and of passing tariff acts, which at this time were called navigation acts, should be sent to a special committee, and his motion prevailed. The North was anxious to secure the provision for a tariff act and the South for the right to import slaves. A compromise was agreed on. The importation of slaves was permitted until 1808; Congress was empowered to pass a tariff act, but exports should not be taxed. This was the third great compromise of the plan of government for the United States.

The draft by the grand committee, now much modified by amendment, and all clauses, action on which had been postponed, were, after a week's further debate, handed over to a committee of eleven, which reported from day to day till the 8th of September. All the articles, as they had been agreed upon, — and they were a series of compromises, — were then given over to a committee on arrangement and style, which four days later reported a draft of a constitution. This was engrossed.

At the last moment, the basis of apportionment was changed in order to strengthen the Constitution with the

smaller states, but many of the members pointed out objectionable features in the plan, and intimated that they could not approve of it. It seemed that the Constitution might be left a mere piece of parchment on the secretary's desk.

To win votes and secure its adoption, Franklin now wrote a conciliatory speech, which, because of infirmity he was unable to read to the convention, was read by James Wilson, and undoubtedly effected its purpose. Gouverneur Morris had handed in a form of approval which he hoped would satisfy the discontented: "Done in convention by the unanimous consent of the states present," which Franklin incorporated in his speech. But his conciliatory speech had no effect upon sixteen of the delegates, who resolutely kept out of the room while the signing proceeded. Washington was the first to affix his name; then the delegates, in the geographical order of their states, beginning with New Hampshire, added theirs. Alexander Hamilton alone signed for New York.[1]

The great matter so long in doubt was now settled, and Dr. Franklin, whose anxiety for the success of the new plan had not been concealed, looking toward the president's chair, pointed out the figure of the sun cut on its back, and observed to a member near him, that painters had found it difficult to distinguish a rising from a setting sun. "I have often and often in the course of the session and the solicitude of my hopes and fears as to its issue, looked at that behind the president without being able to tell whether it was rising or setting, but now at length I know that it is a rising and not a setting sun." On the evening of the 17th of September, the delegates again assembled but only for social intercourse. Their work was done.

The Constitution which they had framed was composite, as was the plan of national government which it outlines.

[1] Of the fifty-five delegates who attended the convention, thirty-nine signed the constitution. Four refused to sign, — Gerry, L. Martin, Mason, and Randolph. Twelve were absent, of whom seven are known to have approved it, and of the twelve only three are known to have opposed it. See Jameson's article in "Report of the American Historical Association, 1902," vol. i, pp. 157–160.

It was written in its final form by Gouverneur Morris,[1] and was arranged under his hand, but not in the order in which its parts had been completed by the convention. Of a preamble nothing had been said during the debates, and this brief introduction to the instrument was added probably by Morris. The phrases of the preamble can be traced back for two hundred and seventy years through American charters and plans of union; but its immediate source was the plan of government submitted by Dr. Franklin in 1775. Its phrases seem to have been selected by Morris from the wealth of material at hand.

The Constitution existed in outline in the Virginia plan submitted by Edmund Randolph, but it also was outlined in part in the New Jersey plan and in the sketch read by Alexander Hamilton. The investiture of power in three departments closely followed the models set in the state constitutions, which instruments, indeed, were the immediate source of most of its derivative provisions. The titles "senate" and "house of representatives" were in use in five states,[2] and the clauses defining legislative procedure were transcripts from state constitutions. The qualifications for the age and residence of senators and members of the House were common to organic laws of the states. New York and South Carolina set a precedent for a census. The division of senators into three classes had a precedent in South Carolina, and annual legislative sessions were common to all the states. Until the Articles of Confederation, no national constituton had provided for the publication of the journal of the legislature. The exclusive right of the lower house to originate money bills, following the precedent of Parliament, prevailed in all the states. The power of impeachment and the provision for the trial of the impeached were similar to state provisions on the subject. The clauses on the powers of Congress were elaborated from the like clauses in the Articles of Confederation. From the state constitutions

[1] The original is preserved in the library of the Department of State in Washington. It has no title; the articles and sections but not the clauses are numbered.

[2] New Hampshire, Massachusetts, New York, Virginia, North Carolina, and South Carolina.

came the clause on the *habeas corpus* and on *ex post facto* laws. The limitations of the powers of the states had a partial precedent in the Articles of Confederation, but most of them had been worked out by hard experience in administration.

South Carolina was the only state which gave its executive the veto power, but the remaining functions of the executive were more or less carefully defined in all the state constitutions. The closest analogy for the provisions on the national executive was the provisions on the executive in the constitution of Massachusetts. The title "president" had been used in the Virginia charters, and occasionally in the charters of other colonies, and was used as the title of the executive in five states.[1] Even the method of choosing the president by special electors was analogous to that of choosing state senators in Maryland, but the precedent was not a close one. The powers of the executive resembled those which had been granted in the state instruments, and which had been proposed in early plans of colonial union. Georgia and New York provided for a message from the governor, and in most of the states that officer had authority to call the legislature in extra session. Strictly speaking, no one state furnished a prototype for the president. The presidency in so far as defined by the Constitution was a composite office, representing an aggregate of powers and functions. The office of vice-president was not thought of until toward the close of the convention, and then as a compromise measure to prevent a hiatus in the government; but a similar officer could be found in New Jersey, Pennsylvania, and South Carolina.

The article on the judiciary approached closely to originality. With no exact precedent for it in history, it was worked out as an agency to meet an obvious demand. Among the reforms early demanded after the ratification of the Articles of Confederation, had been that for the separation of the powers of government and the organization of a separate judicial department. In some details the judicial article ran back to the judiciary provisions in

[1] New Hampshire, New Jersey, Pennsylvania, Delaware, and South Carolina.

the state constitutions, but only so far as these outlined the mere process in judicial proceedings. The jurisdiction of the national judiciary was a distinct creation. The provision on treason has its precedent in the British statute of 1352. Morris took the judicial article as it came to him from the convention, and transcribed it with a few verbal changes. The provision respecting public records was obviously necessary, as was also that for the admission of new states and the obligation of the public debt.

The Constitution was, therefore, the embodiment in written form of a system of national government which had been worked out in this country during the colonial period, and the roots of which ran deep into very ancient soil. It was a plan of government, not a code or a statute. It does not resemble an act of the legislature; it is an embodiment of working principles defining with practical accuracy the co-relation of its parts and depending upon its administration. But when it was sent forth for the approval of the people in the several states, it was considered as nothing more than a new plan of federal government based upon familiar republican principles.[1]

[1] For a critical account of the sources and the authorship of the Constitution, see the author's "Constitutional History of the United States, 1765–1895," vol. iii, pp. 463–515; for the Federal Convention and its work, id. vol. i, pp. 291–595. See also Curtis's "Constitutional History of the United States," vol. i; Bancroft's "History of the Formation of the Constitution," vol. ii, and Meigs's "The Constitution in the Federal Convention." The most important minor authorities and special articles are cited in the above, *passim*.

CHAPTER III

FIRST PRINCIPLES

In acknowledging the receipt of a copy of "The Federalist" [1] on the 28th of August, 1788, Washington wrote to Hamilton: "When the stringent circumstances and fugitive performances which attend this crisis shall have disappeared, that work will merit the notice of posterity, because in it are candidly discussed the principles of freedom and the topics of government which will always be interesting to mankind so long as they shall be connected in civil society." This was written when the long debate over ratifying the Constitution had closed, and preparations were in progress for the election of President and Vice-president and the inauguration of the new government.

The authors of the Federalist — Hamilton, Madison, and Jay — addressed it to the people of the state of New York. The Anti-Federalists looked upon it merely as a party pamphlet and attempted to answer it,[2] but their pamphlets have long been forgotten. It remains the earliest authoritative interpretation of the Constitution, and of the principles on which government in America is founded. Alexander Hamilton, its chief author, was the first to suggest a federal convention,[3] and his sketch of a

[1] The citations in this chapter are to the first edition of "The Federalist."

[2] The most influential Anti-Federalist pamphlets were Richard Henry Lee's "Observations of the System of Government Proposed by the late Convention"; known also as the "Letters of a Federal Farmer"; George Mason's "Objections to the Federal Constitution," and Elbridge Gerry's "Observations on the New Constitution and on the Federal and State Conventions," by a Columbia Patriot. These and other pamphlets on the Constitution published during its discussion by the people, 1787–1788, have been collected and edited by Paul Leicester Ford, Brooklyn, New York, 1888.

[3] In 1780.

government presented to the federal convention contained twenty-two provisions which ultimately were embodied in the Constitution.[1] James Madison was undoubtedly the originator of the Virginia plan, and his activity in the convention has given him the name of the "Father of the Constitution." John Jay personified the better influences which secured the adoption of the Constitution by New York.[2]

It has been well said that "The Federalist" is "the first exposition of the Constitution, and the first step in the long process of development which has given length, meaning, and importance to the clauses agreed upon at Philadelphia. It has acquired all the weight and sanction of a judicial decision, and has been constantly used as an authority in the settlement of constitutional questions."

The primary purpose of its authors was to show that the Constitution embodied the principles of republican government; that it was analogous to the state constitutions, and that it was adapted to the wants of America. The first number appeared just forty days after the adjournment of the convention. At first the plan of the authors was to limit the essays to twenty or twenty-five numbers, and to have them appear in the *Independent Journal* and the *New York Packet,* at intervals of three days. In order to influence the people of other states than New York, in which the question of ratification was pending, the earlier essays, to the number of thirty-six, were printed in a small volume, which bears the date of the 17th of March, 1788. The remaining forty-nine essays were completed early in the following May, and on the 28th of that month were published as a separate volume. On the 17th of June publication in the newspapers was

[1] This fact pretty thoroughly disposes of a number of American writers who have asserted that Hamilton's views as presented by him to the convention were impracticable.

[2] "The Federalist" consists of eighty-five papers. The distribution of the authorship has long been a matter of dispute; twelve of the numbers may have been written either by Hamilton or by Madison. From the best evidence we have, the assignment seems to be as follows: to Hamilton fifty-one, to Madison fourteen, to Jay five, to Madison and Hamilton, jointly, three, to Madison or Hamilton twelve; see H. C. Lodge's "Critical Paper on the Authorship of 'The Federalist,'" in the introduction of his edition of it.

resumed, and completed on the 15th of August; thus the first volume of "The Federalist" was in print before the second was written. It was on the receipt of this first volume that Washington wrote to Hamilton, as quoted at the opening of this chapter.

The burden of the argument running through the essays concerns an alternative: the adoption of the Constitution or the dismemberment of the Union. Jay, who at this time was secretary of foreign affairs, and whose familiarity with them made him an authority, wrote of the American confederation as one of the governments of the world, which, organized in time of war, had proved ineffective under the tests of peace. Several confederacies had been suggested as the remedy for political ills in America, but the true remedy, he wrote, was a federal government vested with sufficient powers for general and national purposes. United America would be the best security against foreign hostilities. Only through an efficient national government could treaties be made, or the violation of them be punished. If foreign relations were under the control of the national government, the states would not be tempted to commit injustice or breaches of faith. The nearness of the states to the territory of Spain and Great Britain [1] was a constant menace to the public peace. The national government would not be affected by local interests, but would promote the welfare of the whole. Availing itself of the experience of the ablest men of the whole country, it would follow a uniform policy of administration, which would be impossible if several confederacies were formed. "When a people or a family divide," wrote Jay, "it never fails to be against themselves"; therefore, the first duty of the American people was to form a more perfect union.[2]

Jay's papers on the desirability of a union under a strong national government follow Hamilton's introduction,[3] in which the general plan of the essays is outlined. Though Hamilton's essays, which form the greater portion of the entire work, touch upon nearly every detail in the

[1] *I.e.* to Florida, Louisiana, New Spain (Mexico, California), Canada.
[2] "The Federalist," Nos. II, III, IV, V.
[3] Id. No. I.

proposed plan of government, the general course of his argument is direct and easy to follow. In both a political and an economic sense, the plan of government embodied in the Constitution would, he said, be the most economical for the American people to institute, and chiefly because it provided adequate protection of the paramount interests of the nation. One national government, supreme in its jurisdiction, would be cheaper than several confederacies; for each of these would not only be compelled to maintain a separate political system, but also to meet the expenses which rivalries, jealousies, and personal animosities, incident to adjoining republics, would inevitably produce; in proof of which Hamilton cited the civil dissensions which had broken out in Massachusetts, under Daniel Shays, in 1786; those in the Wyoming valley in Pennsylvania, between the Connecticut emigrants and those claiming land under a Pennsylvania title in the same year; and those in western North Carolina, between that state and the people of Franklin, in 1787.[1]

Could hostile confederacies preserve the peace better than the states? Undoubtedly not, because the danger of wars would be increased. States unfavorably located, and unable to share in the advantages of ports of entry, would unite in hostile groups. No state would be willing to pay tribute to another. Independent and sovereign states, therefore, meant ceaseless war; from which prospect the inference lay that the more perfect the union of the states the less provocation there would be for war. Union alone would prevent them from falling into irreconcilable factions; thus in every sense the formation of the Union complied with the dictates of a true political economy.

And here Hamilton answered an objection which had been made to the Constitution, — that it did not provide against standing armies.[2] A firm union would remove the tendency toward war. Exemption from the need of armies would thus become a powerful, if not the chief deterrent of domestic faction and insurrection; therefore, it was unnecessary to provide in the Constitution

[1] "The Federalist," No. VII. [2] Id. No. VIII.

against standing armies. The people were fully protected, in this regard, by the limitation on Congress to provide for an army for a longer period than two years.[1] The public liberties could not be overturned in so brief a time. The plan gave ample protection to the liberties of the people by its distribution of civil power into distinct departments, by its maintenance of checks and balances in legislation, and by its institution of courts, composed of judges holding offices during good behavior and thus being independent. But above all the system was based upon the direct representation of the people. It was their government, was subject to their will, and was responsive to whatever changes they might see fit to make in it.[2]

Montesquieu had maintained in his "Spirit of Laws," that a confederated republic could not extend over a large country because the jealousies inevitable among confederated states would constantly tend to limit the extension of its jurisdiction.[3] The eminent Frenchman's criticism, Madison explained, did not apply to the proposed plan. There was a distinction between a national union and a confederacy; between a mere consolidation of states and a union of states upon the principle of representation.[4] The mechanical organization of the national government tended to prevent the existence of factions,[5] and, therefore, to remedy the fatal propensity of republican governments. Madison remarks that it is natural for men to hold different opinions, and especially on government; whence it follows that the first object of government is to protect the faculties by which these opinions are formed. Government should protect both the rich and the poor, and justice should hold the balance between parties. No faction can permanently settle the gravest questions which arise in a state; namely, the apportionment of taxes, the regulation of commerce, and the encouragement of home manufactures. Interests apparently so irreconcilable as these can be settled only by enlight-

[1] Article I, section 8, clause 12.
[2] "The Federalist," No. IX.
[3] The "Spirit of Laws," book IX, chap. i.
[4] "The Federalist," No. XIV.
[5] Id. No. X.

ened statesmen, and yet enlightened statesmen are not always to be found in a country, whether great or small. For this reason the form of the state, that is, its mechanical organization, he believed, should, as far as possible, contribute to the solution of the problem. If a state has no enlightened leaders, it must be saved from itself, if possible, by the form under which the principles of its government are administered.

This emphasis of the mechanics of government, the mere form of the state, is made throughout "The Federalist," and reflects the dominant political thought of the times in America. Madison calls it the great mechanical power in government.[1] He argued, as did Hamilton and Jay, that there is a necessary connection between the character of a government and the form which the government takes. And this harmony between the principles and the form of republican government was attainable, in Hamilton's opinion, either by awakening like passions and interests in the majority of the people, or by securing a mechanical organization in the state which would prevent concert in oppressive measures. As the first is impossible, the second must be sought;[2] whence his emphasis of the value of the mere form of republican government. The form proposed in the national Constitution was, he declared, the practical approximation to this ideal.

By the form of the government is understood the division of its functions, the separation of its parts, and the relation existing among them. And, first of all, the form is republican because it is representative; the legislative, the executive, and the judicial embodying and representing the will of the people in the direction and control of the public business. The parts are not independent. The legislative power is vested in Congress, yet the chief executive participates in legislation. The judicial power is vested in one supreme court and in inferior courts; but the judges are appointed by the President with the consent of the Senate, and are removable on impeachment by the House of Representatives and conviction by the Senate.[3] The President is removable in the same manner.

[1] "The Federalist," No. XIV. [2] Id. No. X.
[3] Article I, section 2, clause 5; section 3, clauses 6 and 7.

This statement of the distribution of the powers of the government does not now give an adequate idea of what the authors of "The Federalist" meant by the importance of the civil form. They could not have, save in theory, an extensive knowledge of the actual working of the form they advocated in administration. To them the principles of the government were clear, and the form was, as it were, wedded to the principles. Adherence to the form, therefore, meant adherence to the principles; whence it followed, as a practical matter, that the authors of "The Federalist" extolled the concrete form of the proposed government, because in supporting the form the American people would secure the benefits of the principles on which the form is based. They referred to the government as it would be in actual operation, and to the Constitution as a practical working system; so they emphasized provisions which we inherit as long accepted facts. The two Houses of Congress are not chosen at the same time nor in the same manner, nor for the same term, nor to perform at all times the same duties. The President is elected in still another way to perform different duties and for a different term. The courts are organized in yet a different way. The government is so composed that there will be no lapse or hiatus in any department. The Constitution makes provision for a continuing system in every department; it is planned to be perpetual, but it depends directly upon the will of the people for its perpetuity.

The evils which government is designed to prevent, or to overcome, are a constant element in human society; and the best that can be hoped for in government will be realized under that civil form, which, in actual operation, realizes this purpose with the least violence of principle, and to the greatest advantage of the people. The authors of "The Federalist" did not deny that government is an artificial thing; they nowhere claimed, as is often claimed in our day, that it is an organism. They viewed it as an agreement, or compact, made for a specific purpose. Madison's notion, — and Webster held to it after him, — that the people must be saved from themselves, is a confession of belief in the mechanical theory of government which prevailed at the time that our Constitution

was made. That notion belongs, as many now believe, to a creed outworn. Whatever may be said of the truth of that notion as a philosophical proposition, it proved a working theory in American government. The authors of "The Federalist" could do no more than argue that the national system proposed in 1787 would secure the ends outlined in the preamble to the Constitution: that it would "form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty."

When the Constitution was framed, that trust in the wisdom of the people which we find expressed commonly, by American statesmen through the nineteenth century, and notably in the time of Lincoln, did not exist. On the contrary, the makers of the Constitution, with the possible exception of James Wilson, repeatedly showed during the debates of the convention their lack of faith in the capacity of the people to govern themselves wisely. Most conspicuous among those who doubted the capacity of the people for self-government was Elbridge Gerry. This distrust of popular government was in the air at the close of the eighteenth century, and must be taken into account in any attempt to trace the growth of popular government in America. This distrust lies at the bottom of the insistence which Hamilton and Madison put upon the importance of the mere form of the government, — the mechanics of the state.

The arguments in "The Federalist" were advanced to show that the adoption and preservation of the republican form, as embodied in the Constitution, was essential to the welfare of the American people. The Union must be established, otherwise America would be ruined. And first, without the Union, the industrial prosperity of the country would be destroyed.[1] A national government like that proposed could alone protect the commerce and manufactures of the country. This meant in brief, that the war powers and the resources and functions of the national government must be adequate to the protection of the people.

[1] "The Federalist," No. XI.

State experience under the Confederation had proved the impossibility of supporting a general government by direct taxation.[1] Laws levying direct taxes had multiplied, but the state treasuries remained empty. The system of direct taxation had ruined trade. Excises, that is, internal indirect taxation, had proved unpopular, therefore the chief source of national revenue must be a tax upon imports. The system of taxation must be applied for the benefit of the people at large, and that could best be done under a general union. The national government could collect such a tax more cheaply than could thirteen separate state governments.[2]

"The Federalist" emphasizes the distinction between a confederation and a national government:[3] the first being based upon civil corporations, which in America were the several states; the second being founded upon the people of the country, irrespective of their state affiliations. A confederation addresses itself to states, represented by legislatures and governors, and executes its laws indirectly through them. A national government addresses itself directly to individuals and executes its laws through and upon them. The defect in a confederacy is the lack of a sanction to its laws; in a national government the decrees and purposes of courts of law can be enforced directly upon the individuals affected by them. As large bodies of men act with no more justice than do individuals, the civil harmony in a confederation is less than in a national government, and harmony is preserved by the form of the government as well as by the self-interest of the individuals. The principal danger to which a confederation is subject is the secession of its members, the effect of which is the dissolution of the Union, because no member of it has power to control the adherence of the rest.[4]

Hamilton, in analyzing the defects of a confederation, dwelt upon its tendency to degenerate into a military despotism.[5] The only means to prevent its disruption would be in the last resort, — the coercion of arms, which

[1] "The Federalist," No. XII.
[2] Id. No. XIII.
[3] Id. No. XV.
[4] Id. No. XVI.
[5] Id. Nos. XVII, XVIII.

means civil war. In a national government peace and harmony might be preserved by the coercion of laws; that is, by the adjustment of legislation to the changing wants of the people.

Many of the opponents to the national plan, in 1788, declared that the proposed government would be too powerful and would absorb the states. Hamilton and Madison thought it far easier for the state governments to encroach upon national authority than for the national government to encroach upon the states, and they based their opinion upon the greater degree of influence which the state governments would possess immediately with the people, because of their closer relations with them. From this it followed that until the national government exercised the same means as the states, and possessed the same powers of reaching individuals, it would be subordinate to the state governments.[1] So Hamilton argued that there could be but one remedy for the weak attachment of the people to their national government, and that was a better administration of the national government than of the state governments. The strength of the new government would be tested by the efficiency of its administration. This is the grand political deduction from "The Federalist."

"The streams of national power flow immediately from that pure, original fountain of all legitimate authority, — the consent of the people themselves."[2] This declaration by Hamilton is in principle the keynote of our national system, and the principle it figures runs through all the great decisions of the supreme court on the nature of our government.[3]

The Anti-Federalists, in the ratifying conventions, made common objection to what they called the provision in the Constitution for a standing army.[4] The answer in "The Federalist" is that a small army is necessary for the protection of the frontier, and that a navy is essential

[1] "The Federalist," No. XVI. [2] Id. No. XXII.

[3] It is applied and elaborated by Chief-Justice Marshall, in McCullough *v.* Maryland, 4 Wheaton, 316 (1819), and again in Cohens *v.* Virginia, 6 Wheaton, 264 (1821).

[4] Article I, section 8, clause 12.

to the commercial welfare of a free people.[1] A person writing on the subject to-day would speak of the people of the United States as constituting the equivalent of a standing army. Our population is now more than seventy-five millions and represents, practically, an irresistible power. The economic force of America in the world to-day is incalculable; it is sufficient, if justly utilized, to maintain the peace of the world. "The Federalist," however, makes no such reference or explanation. The army and the navy, made possible by the Constitution, were to be used to guard the frontiers and to protect the commerce of the country. The Anti-Federalists emphasized the objection to a standing army and made vigorous references to the attempt of Great Britain, in 1776, to coerce the colonies. They did not, or would not, conceive of the government of the United States as being the government of all the American people. They conceived it to be a thing apart from the people, and therefore its powers should be reduced to the lowest terms. In defining the provision for an army and navy, Hamilton applied his usual economic test: a national army and navy would be less expensive and more efficient than ships and troops supported by the several states. They could be directed more effectively than state forces, especially as they were to be under the charge of a commander-in-chief.[2]

At the time the Constitution was made, the tendency in constitutional reform was but slightly toward the limitation of the power of the legislature, but strongly toward a limitation of the power of the executive.[3] Hamilton held to the principle that "it is better to hazard the abuse of confidence than to embarrass a government and endanger the public safety by impolitic restriction on the legislative authority."[4] To this extent, at least, he was a democrat, that he would trust the people to watch over their own interests. He considered the danger, that the civil authority would be subordinate to the military, as passed; indeed, the peril was rather the other way. But he concluded that public confidence in the government

[1] "The Federalist," No. XXIV. [2] Id. No. XXV.
[3] See the chapters on the state constitutions, *post*.
[4] "The Federalist," No. XXVI.

and the obedience of the people to it would be proportioned to the goodness or badness of its administration; and here he left the whole matter.[1]

"The Federalist" presumes that the national government will be in the hands of men superior to those who direct the affairs of the several states, because of the larger questions involved; and this, whether these men were chosen directly by the people or indirectly by the state legislatures. But on this point "The Federalist" spoke to a doubting people who had quite lost confidence in federal unions because of the failure of the Confederation. For some time before its collapse, in 1786–1787, the ablest men in the country were in the service of the states, and it seemed doubtful that service under the United States would ever again attract them. Washington found it difficult to secure the right kind of men to fill the offices in the new government. In this respect men and things have changed; federal offices are now preferred to state offices. Hamilton anticipated this. He believed it would follow, as soon as the most important interests of the individual were in any way identified with the organization and interests of the national government.

A common objection of the Anti-Federalists to the Constitution was the power of taxation which they asserted it gave to Congress. They claimed that the power was unlimited, and would in all probability be abused. The reply of "The Federalist" was complete: "Money," says Hamilton, "is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue: either the people must be subject to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish."[2]

[1] "The Federalist," No. XXVII. [2] Id. No. XXX.

And he laid it down as a political maxim "That in the usual progress of things, the necessities of a nation in every step of its existence will be found at least equal to its resources."[1] From this follows the inference that the power of the general government to utilize its resources should be unlimited; therefore there should be an unlimited power of taxation. The national government would thus secure the first condition of maintaining public credit.

The exercise of the power would be the test of congressional discretion. In the exercise of this discretion the people themselves would bear the responsibility, for they would select their own representatives. The controlling principle in the exercise of the taxing power, Hamilton maintained, is the same as that which prevails in the organization of the government itself: a national government must contain within itself every power that is requisite to the full accomplishment of the objects committed to its care and to the complete execution of the trusts for which it is responsible, and be free from control, save a regard to the public good.[2] He deduced three principles of administration from his general principle of taxation: first, that as there can be no possible limits assigned to the casualties and dangers to which a government may be subject, the power of providing against them should have no other bounds than the exigencies of the nation and the resources of the community; secondly, that as revenue is the means for meeting these exigencies, the power for procuring it should be unlimited; and thirdly, that the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes pursued by governments; which last conclusion he based upon the unhappy experience of the people under the Articles of Confederation.[3] These maxims of administration are only a condensation of the principle of which the entire "Federalist" is an elaboration, — that in government the means must be adequate to the ends proposed.[4]

[1] "The Federalist," No. XXX. [2] Id. No. XXXI. [3] Id.
[4] This principle was applied by Chief-Justice Marshall, in McCullough v. Maryland, 4 Wheaton, 316.

To the common objection of the Anti-Federalists, that the proposed national government might usurp powers dangerous to the people, "The Federalist" made one conclusive reply: "All observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers."[1] In other words, no matter what may be the form of our national government it must of necessity possess adequate powers, and of these that of taxation is of first importance. The unlimited power in the national government to levy taxes does not conflict with the power in the legislatures to provide state revenues. The people delegate the taxing power to two bodies of men, — Congress and the state legislatures, and rely upon the discretion of these neither to confuse nor to abuse their authority. The federal convention was very skilful in avoiding a possible collision between the state governments and the national government in the matter of taxation. No limitation of the power of the states to tax, found in the Constitution, in any way deprives them of the power to raise an adequate revenue for strictly state purposes.[2] The prevention of excessive taxation is the preservation of taxable resources.[3] If a tax upon an article is exorbitant, its use will cease, or the law will be evaded. In either case revenue fails.

The authors of "The Federalist" based their exposition of the administration of national finances upon the desirability of a tariff for revenue. The system of taxation which Congress would be likely to adopt would bring about a national revenue derived chiefly from duties on imports, and, to Hamilton's mind, a system of this kind was more likely to divide the burden of tax equitably among the people than any other that could be devised. This is a point on which men have differed, and their conflicting opinions lie at the bottom of the doctrines which political parties have enunciated in this country on the subject of revenue, taxation, and manufactures, now for more than a century.

[1] "The Federalist," No. XXXI.

[2] For an elaborate analysis and discussion of this point, see *Ex parte* Siebold, 100 U. S. 371.

[3] "The Federalist," No. XXXV.

"Among the difficulties encountered by the (federal) convention," says Madison, "a very important one must have lain in combining the requisite stability and energy in government with the inviolable change due to liberty and to a republican form." [1] The history of energetic governments is the history of monarchies. Confederacies and all liberal governments have usually lacked energy. It was a problem at the time when our Constitution was made, whether the energy requisite to a government could be secured in one of republican form. The authors of "The Federalist" argued that the problem had been solved in the Constitution of the United States by the separation of powers and the definition of functions, — that is, by the adoption of what they called "a system of checks and balances." Madison defines a republic as "a government which derives all its powers directly, or indirectly, from the great body of people, and is administered by persons holding office during their pleasure, for a limited period, or during good behavior." [2] The national government rests upon the people; is republican, that is, representative in form; contains within itself the regulation of its own energy for its control or direction of the public business, and is responsible to the people.

The means by which the government is thus made responsive to the public will springs from its organization. The terms for federal officers vary; their powers are defined, and the operations of the government itself are divided and classified. Thus we come back to the mechanical arrangement of the government as the means of constituting a system of checks and balances for preventing the abuse of power. The foundation of the government of the United States is federal because it was ratified, not by the individuals who compose the nation, but by the people grouped in states. It was founded neither by the decision of the majority of the people, nor, adds Madison, of a majority of the states, but by the assent of a definite number of states.[3] Its powers are in part from a national, in part from a federal source; those exercised by the

[1] "The Federalist," No. XXXVII. [2] Id. No. XXXIX.
[3] Constitution, Article VII.

Senate from a federal; those exercised by the President and by the national judiciary from a national; therefore, the sources from which the powers of the United States are derived are neither wholly federal nor wholly national.[1] In its operation, the government is national, not federal, because it executes its will directly upon the citizens in their individual capacities. In the extent of its powers it is federal, not national, because they are delegated, and "its jurisdiction extends to certain enumerated objects only, and leaves to the several states the residuary and inviolable sovereignty over all other objects."[2] The procedure in amending the form of government is partly national and partly federal. An amendment must be proposed either by Congress, which would be a national procedure, or by conventions of the states, — a federal procedure; and it must be adopted by a prescribed number of states, — a federal act.[3] The government of the United States is wholly national, therefore, only in the operation of its powers. In its foundation, in its source, in the extent of its powers, and in the mode of its amendment it partakes both of national and of federal characteristics.

[1] "The Federalist," No. XXXIX. [2] Id.

[3] The fifteen amendments which have been adopted have emanated from Congress; although the first ten were compiled, as it were, from the one hundred and sixty-one, proposed, in one form or another, by the ratifying conventions in 1787–1788.

CHAPTER IV

First Principles (*Continued*)

The principle being established that a government must possess powers adequate to the ends which it seeks to attain, it follows that the specification of these powers, either directly by enumeration, or impliedly by administration, will be largely a matter of expediency. The problem is practically a political one, which must be solved in the best manner possible from time to time. But the problem involves, as Madison expresses it, "questions of a very delicate nature."[1] Throughout "The Federalist" the national government is usually termed the Confederation or the Confederacy, for the word "national," in the sense in which it is now employed, did not come into common use until after 1860. One of the questions of a very delicate nature of which Madison speaks, is of the right of the federal government to coerce a state in case of its secession. He offers no direct answer to the problem; he conceives of the Constitution as a compact between the states, and that if the time ever should come when a member of the Union would attempt to secede, it would "find it a difficult task to answer the multiplied and important infractions" with which it might be confronted. This means, if it means anything, that the difficulties which the secession of a state would entail upon it would be so great as practically to prevent secession. The authors of "The Federalist" relied upon the provision in the Constitution for its amendment as a preventive of secession.[2]

The opponents of the Constitution reiterated their fears of the abuse of power by the general government. The answer of "The Federalist" is comprehensive and com-

[1] "The Federalist," No. XLIII. [2] Id. No. XLIX.

plete: that in government it is "a received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration, and conversely, the smaller the power the more safely may its duration be protracted." [1] The entire change of the House of Representatives every two years, if the people so will; the retirement of the President after a term of four years or sooner, if he should be impeached, and the retirement of one-third of the Senate every two years, illustrate the practical working of its mechanism. The organization of the government makes it difficult, if not impossible, for those in power to abuse it, at least for a long period of time. The principle thus laid down in "The Federalist" was stated in somewhat difficult language, but perhaps more forcibly later by Lincoln: "By the form of the government under which we live this same people have wisely given their public servants but little power for mischief; and have with equal wisdom, provided for the return of that little to their own hands at short intervals. While the people retain their virtue and vigilance in administration, only the extreme of wickedness or folly can very seriously injure the government in the short space of four years." [2]

Objection was made to the Constitution, when it was before the people for ratification, that it did not provide an adequate popular representation; that the membership of the two Houses of Congress was too small. Commenting on this objection, "The Federalist" remarks on the principle which should be followed in representation: that the legislative body should be sufficiently large to guard against too easy a combination for improper purposes, and sufficiently small to avoid the abuses and interference of the multitude.[3] The number of members, therefore, in either House, should depend upon the proper requisites for a working legislative body quite as much as upon any strictly mathematical basis of representation; and this rule has been followed since 1850, in determining the size of the House of Representatives. Of course

[1] "The Federalist," No. LII.
[2] First Inaugural; Works, vol. ii, p. 7; Richardson, vol. vi, p. 11.
[3] "The Federalist," No. LV.

the number of senators is determined by the number of states.

A more serious objection was made by the Anti-Federalists: that the House of Representatives would make legal discriminations in its own favor, or on behalf of a particular class. "The Federalist" answers that such an invidious discrimination is against the genius of the whole system proposed.[1] The laws of Congress must be of a general nature, or, if of practical application, be in substance and spirit a component part of general legislation. The preventive of odious legislation by Congress must be the same as the preventive of unjust taxation: that is, the wisdom and discretion of the law makers. The exclusive power of the House to originate money bills was regarded by Hamilton as the most complete and effective weapon with which any constitution could arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[2] If in practice this exclusive power has not proved so strong a check as the authors of "The Federalist" anticipated, the effect does not diminish the relevancy and force of their argument. In the eighteenth century, and especially when the first American constitutions were framed (1776–1789), the exclusive right of the lower House to originate money bills was conceived to be the chief security of the people.[3] The authors of "The Federalist" in making up their argument on this point merely utilized a prevailing opinion of their time.[4]

That the proposed national government contains within itself the means of its preservation is a major premise of "The Federalist."[5] It is essential to the exclusive working of any government that it possesses practically unrestricted power. In a representative government like

[1] "The Federalist," No. LVII. [2] Id. No. LVIII.

[3] See chap. v.

[4] The feeble foundation of this popular belief and the impotency in practice of the exercise of the exclusive right by the house to originate money bills was soon recognized by the people. The state constitutions adopted after 1820 usually gave either house the right to originate money bills. The protection of the people lies in the exercise of discretion by the legislature, whether state or national, and whether the powers granted are common or exclusive.

[5] "The Federalist," No. LIX.

our own, the great organisms, its executive and legislative branches, are the free choice of the people. The source of danger is in the control of elections by violence and corruption. The preservation of the national government, therefore, means practically, with us, the preservation of the purity and freedom of elections.[1] Hamilton and his colleagues in "The Federalist" do not emphasize the vital importance of the purity and freedom of elections. The subject was one of which they could not speak authoritatively, because at the time "The Federalist" was written the Constitution was not yet ratified. It might reasonably be expected that after the experience of the revolution the American people would be watchful of their own interests. Generally speaking, flagrant violations of election laws were not frequent until after the extension of the suffrage to the negro in 1867; and in 1787 universal suffrage was not advocated by any respectable body of people. Indeed, universal suffrage at that time, as the debates in the federal convention show, was feared rather than desired. The founders of our government were familiar with a limited suffrage, guarded by property, and by racial, and in some states, by religious qualifications.[2] The whole matter of the control of the suffrage was left to the states.

When, in "The Federalist," it is said that the national government should contain within itself the means of its own preservation, its authors were thinking of the organization and mechanical arrangement of the national government; its House of Representatives, chosen by the voters in the several states; its Senate, chosen by the state legislatures; its President, chosen by a special body of electors; and its judiciary, appointed by the President with the consent of the Senate. In other words, they were thinking of a federal not of a national government. They were not thinking of national citizenship as the primary source of national authority.

[1] *Ex parte* Yarborough, 110 U. S. Reports, pp. 651–667; see also "Kent's Commentaries," vol. i, p. 201. (Twelfth Edition.)

[2] For an account of the suffrage in the eighteenth century in America, see the author's "Constitutional History of the American People, 1776–1850," vol. i, chaps. iii, vii, xii.

The federal character of the general government is illustrated in the Senate, which, "The Federalist" declares, is "a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty."[1] Now it will require but little reflection to reach the conclusion that to form a clear idea of "residuary sovereignty" is very difficult; indeed, the phrase is self-contradictory; sovereignty means simply absolute and unlimited power. The term "residuary" signifies a limitation and destruction of sovereignty, yet the notion of residuary sovereignty, as a paramount quality of the state governments, has been sustained repeatedly by the courts,[2] and has become a working idea in the American system. Practically, it means that the states control their own strictly domestic affairs, and that with these the general government has nothing to do. The recognition of this local freedom and independence is called residuary sovereignty in "The Federalist," and the phrase remains one of vague but generally accepted meaning in our political vocabulary.

The purpose of the Senate in our national system was somewhat complex; namely, to represent the several states as political corporations, and to perform special functions; for example, to act as a court in cases of impeachment and to participate with the President in the exercise of the appointing power and in the making of treaties. The principal reason for assigning it these special prerogatives was based on its permanency and size. The Senate most nearly approaches a permanent body of any department of the national government: its membership can never be large and its members are elected for six years; relatively a long term. Hamilton, when discussing the organization of the Senate in the federal convention, urged life membership. He desired to approach as closely as possible the organization of the House of Lords. His search was for independence and permanency. But a legislative term for life was not in harmony with the repub-

[1] "The Federalist," No. LXII.
[2] As in Texas *v.* White, 7 Wallace, 700 (1868).

lican system, as understood in America. The term for six years was a compromise. It is not because a senator represents a state, but because he holds office for six years that gives so great value to his functions. As "The Federalist" expresses it, the Senate is a permanent guarantee against "the mutability in the public councils from a rapid succession of new members, however qualified they may be." [1]

The annual term for the legislature prevailed in all the states at the time the national constitution was framed. In Connecticut, during the colonial period, there were for a time semi-annual elections of the legislature. The annual term may be said to represent the conviction of the American people in the eighteenth century, that the law-making body should closely represent changes in public opinion. Under the Articles of Confederation members of Congress could be recalled by the legislatures, which elected them, at any time, — a condition of affairs which carried the democratic doctrine of representation to an extreme, and which was one of the primary causes of the collapse of the Confederacy. The evil results were realized at the time the Constitution was made. "The want of confidence in the public council damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. . . . No government, any more than an individual, will long be respected, without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability." [2]

Here, too, "The Federalist" clearly indicates one of the chief purposes in creating the United States Senate: namely, to secure order and stability in the government. In a monarchy, order and stability are secured largely by distinct and fixed classes of people: the royal house, the nobles, and the commons. In a republican government, no such distinctions can exist; for if they exist, there can be no republican government. The framers of the Constitution, therefore, had to work out devices and substitutes for organizations which they had known all their lives as Englishmen. The Senate was one of these devices.

[1] "The Federalist," No. LXII. [2] Id.

It was the outgrowth of a conscious effort in America to secure stability in legislation.

"The objects of government may be divided into two general classes: the one depending on measures which have single and immediate and sensible operation; the other depending on a succession of well chosen and well connected measures which have a gradual and perhaps unobserved operation."[1] In other words, some of the objects of government are temporary, others permanent. But it requires sagacity and large practical knowledge to be able to discriminate and to determine what measures shall be temporary and what permanent. Sooner or later every government must determine what, in a general way, its fixed policy shall be; just as an individual must decide in a general way on his course in life.

A democracy is by nature the most unstable form of government, unless a fixed public policy, clearly outlined in its constitution or its traditions, is adhered to; or its people, experienced in government, shall have formed the unalterable habit of pursuing such a policy. Either of these conditions is rare. Human nature is uncertain. The idea is well expressed in the constitution of Massachusetts of 1780, that government should be one "of laws and not of men." This means in practical politics that the mechanics or arrangement of the government will be such as practically to prevent a dangerous departure from the principle. A fixed public policy will be secured, if secured at all, by the actual workings of the government. The framers of the Constitution sought to secure this result by a system of checks and balances; that is, by the actual working together of the executive, the legislative, and the judiciary departments. In the scheme the Senate represents permanency and stability, and is defended in "The Federalist" because it would possess, or promise to possess, these qualities. It promised to be the chief factor in securing the most desirable thing in government, — a fixed policy.

The participation of the Senate in the making of treaties is defended in "The Federalist" by Jay, on the ground that "the state legislatures who appoint the senators will

[1] "The Federalist," No. LXIII.

in general be composed of the most enlightened and respectable citizens; there is reason to presume that their attention and their votes will be directed to those men only who have become most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. . . . The inference which naturally results is that the President and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several states or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged." [1] A popular assembly would be too large, too volatile, too liable to prejudice; in other words, could not be trusted. Treaties are matters often requiring secrecy and despatch: requisites which could not be expected in a popular assembly. The treaty-making power was therefore wisely given to the President and the Senate.

The Anti-Federalists objected to the Constitution because it declares that treaties are a part of the supreme law of the land: whence, they asserted, that the President and the Senate would act "without an equal eye to the interests of all the states." Jay observed that the opponents of the system seemed "not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern as the laws passed by our legislatures." But the most telling answer went deeper: "In proportion as the United States assume a national form and national character, so will the good of the whole be more and more an object of attention, and the government must be a weak one indeed, if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts which compose the whole." Having no private interests distinct from that of the nation, the President and the Senate would be under no temptation to imperil or neglect the nation by any exercise of the treaty-making power, and the idea that the President and two-thirds of the Senate would be open to corruption was,

[1] "The Federalist," No. LXIV.

he said, "too gross and too invidious to be entertained. But in such a case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations." [1]

Hamilton defended the plan for utilizing the Senate as a court for the trial of impeachments on the ground of economy.[2] Some provision must be made for the trial of impeached persons, and the question resolved itself into a choice of agencies. The federal courts could not be used because of the resulting confusion of judicial and political functions. The House of Representatives could not be used because its judgments would usually be partisan. The Senate, consisting of men chosen for a long term, and therefore being of more independent judgment than the representatives, presumably offered the fewest objections, and the remaining objections were largely obviated by the requirement that while sitting as a court of impeachment the senators should be under oath; an additional obligation which it was believed would secure the end proposed. The alternative was the delegation of the authority to some new body: a course ruled out by its expense. The Anti-Federalists' objections that the Senate while sitting as a court of impeachment might yield to corruption, was answered as Jay answered an earlier objection, — that the idea was too gross to be entertained. It will be noticed that the main reliance of the authors of "The Federalist" for ability and uprightness among senators was on the manner of their selection: they were to be picked men, chosen by the legislatures; therefore, they were likely to be the ablest and most desirable that could be obtained.

Hamilton, in speaking of the mode of the appointment of the President, observes that it was almost the only part of the system which escaped severe censure, and which received the slightest mark of approbation from its opponents.[3] Even Richard Henry Lee, the most aggressive critic of the Constitution, declared that the election of the President "was properly secured." [4] The

[1] "The Federalist," No. LXIV. [2] Id. No. LXV.
[3] Id. No. LXVIII.
[4] "Letters of a Federal Farmer," vol. iii.

provisions respecting the President were the last settled by the federal convention. At one time, as we know, this part of the problem seemed insoluble: that the convention thought of adjourning, and that finally, the matter was settled by a series of compromises.

James Wilson wished to have the President chosen by direct popular vote, but this idea was too novel in 1787 to win support. It was at first proposed that the President should be chosen by the national legislature; then a body of special electors was suggested as a means of escape from corruption and intrigue. In the method of choosing senators, pursued in Maryland in 1787,[1] the convention found a precedent for the method of choosing the President finally adopted: namely, the choosing by special electors. That both Federalists and Anti-Federalists approved of this method shows plainly that the idea of republican, or popular government in America in the eighteenth century differed widely from the idea which prevails in our day. The electoral college, as the presidential electors are popularly called, has become merely a registering machine, but it stands for an essential quality of our national government; namely, its federal character. The President of the United States is chosen by the people, voting by states; that is, by a federal, not a national act. For this reason the Anti-Federalists did not object to the provision for presidential electors.

In all the ratifying conventions which suggested amendments, many objections were made to the powers of Congress. The substance of these objections was that the state governments would be in constant danger from the federal government; in other words, that the so-called residuary sovereignty of the states would be in danger of being reduced to the lowest terms. The objections were chiefly to the power regulating commerce, to the power to control elections, and to the possible abolition of slavery by the general government.

To all objections of this character the authors of "The Federalist" gave answers more or less explicit:[2] first,

[1] Under its first constitution (1776).
[2] "The Federalist," Nos. LVIII–LXVI.

that the powers delegated to Congress were necessary to the ends proposed by the government itself; and secondly, that the abuse of these powers could speedily be corrected by the people. The Anti-Federalist objections to the power of the executive were answered in like manner.[1] It was shown that the term of the executive office is too brief and the limitation of his powers too explicit to enable him seriously to endanger the safety or the liberties of the country. The Senate would be a check upon the appointing power. Congress itself could overrule the veto and the President could be impeached, convicted, and removed from office for high crimes and misdemeanors.

But the main reliance of Hamilton, for the excellence of the proposed system, was on the administration of the government. "The administration of government in its largest sense," says he, "comprehends all the operations of the body politic, whether legislative, executive, or judicial; but in its most usual and perhaps in its most precise signification it is limited to executive details, and falls peculiarly within the province of the executive department."[2] The chief thing to be desired in administration is stability, and this, he thought, would be secured by the centralization of the executive authority in a single person, — the President, — who would thus be clearly marked as the one man responsible for the condition of affairs. Here, as in other parts of the plan, the people would have every advantage, for the President would be of their own choosing.

Nothing is said, in "The Federalist," of political parties; their powerful influence and agency is not even anticipated. No hint is given that the administration of the government of the United States would fall under the control of such organizations. "The Federalist" discusses the philosophy of the proposed civil plan, and is in no sense a history of American party politics. We turn to it for an analysis of the principles on which our system of government rests, and for the opinions of the Fathers concerning popular government. The true test of a good government, continues Hamilton, is its apti-

[1] "The Federalist," Nos. LXVII–LXXVII.
[2] Id. No. LXXII.

tude and tendency to produce a good administration.[1] This reminds one of Franklin's remark made near the close of the federal convention, that there is no form of government which may not be a blessing to the people if well administered. In America the administration of government has proved a party affair: a matter depending upon Democrats, Whigs, or Republicans as political organizations.[2]

In the old Confederation, the state governments possessed a transcendent advantage in the ordinary administration of criminal and civil justice for which the Articles made no provision whatever. There were no federal courts. Hamilton remarks in "The Federalist," that the administration of justice "of all others is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property,

[1] "The Federalist," LXXVI.

[2] Since "The Federalist" was written many books have appeared discussing government in America. Two may be said to have attained the distinction of political classics: De Tocqueville's "Democracy in America," 1844, and Bryce's "American Commonwealth," 1888. The first resembled "The Federalist" in attributing the excellence and the vitality of the American system of government to the mechanical arrangement as associated with the popular basis of the system. It attributes great importance to the isolation of America, to the essentially religious character of its people, and to their practical tendencies. But De Tocqueville sees more in the people themselves than in either their institutions or their laws. Half a century later, in the second foreign commentary on our institutions, emphasis is laid on the power and operations of political parties rather than upon the political system as a philosophical idea. Mr. Bryce attributes more to social conditions as a source of political power or as adjuncts to the workings of political parties than to the elements of mechanical organization dwelt upon so earnestly by the authors of "The Federalist." They saw in the constitution of the United States little more than a form of legal compact, a fiction agreed upon, a scheme advanced by sagacious men to promote the general welfare. Mr. Bryce sees in the system a mechanism, a political body, whose parts and functions are analogous to those of living things. The three descriptions of government in America, — "The Federalist," "Democracy in America," and "The American Commonwealth," — seem at first to have little in common, but upon close examination they are found to accord with the ideas of government prevailing at the times they were written. Hamilton, Mason, and Jay differ from De Tocqueville and Bryce, because since the days of "The Federalist" men have come to realize that government is not an abstraction but *an organism*, and that the so-called departments of government are not mere arbitrary divisions but correspond to necessary functions.

having its benefits and terrors in constant activity before the public eye, regulates all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, and contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence toward the government." [1] He calls the administration of justice "the great cement of society," and attributes the weakness of the old Confederation largely to its lack of a federal judicial system.

Anti-Federalist objections to the judiciary were to the manner of its organization and the probable extent of its power. In the eighteenth century the people were familiar with the appointment of judges: none were elected; and they were also familiar with the life tenure of judicial offices. The unknown quantity in the judicial department of the new government was "the partition of the judicial authority between the different courts, and their relation to each other." [2]

One of the ends aimed at in the Constitution was an independence in the judiciary which could alone be secured by tenure of office during good behavior and by fixed salaries. These conserving elements are secured by the Constitution. The Anti-Federalists objected to the powers of the proposed judiciary because they seemed to endanger the states and to trespass on the jurisdiction of state courts. This raised the whole question of jurisdiction. In considering this question, "The Federalist" goes directly to the point: that the purpose in organizing the federal judiciary is the same as that in organizing the legislative and the executive, — the peace of the Union.[3] Having laid it down as a principle that every government must possess the means of executing its own provisions by its own authority, Hamilton was led to the necessary conclusion, "That in order to secure the inviolable maintenance of that equality of privileges and immunities to

[1] "The Federalist," No. XVII.
[2] Id. Nos. LXXVIII, LXXIX.
[3] Id. No. LXXX. Hamilton in this number calls the Union the *Confederacy*, a term in common use at the time and continued until the time of the civil war.

which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachment, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." [1] Many cases must arise in the settlement of which the state courts cannot be expected to be impartial. The federal courts are the proper tribunals for determining controversies which may arise between different states and their citizens.[2]

Some of the Anti-Federalists objected to vesting the judicial power in one supreme court of final jurisdiction. They preferred to vest it in a branch of the legislature, and notably in the Senate: a confusion of legislative and judicial functions which Hamilton was quick to point out. They asserted that if the federal courts were to be allowed to construe the laws according to the spirit of the Constitution, they would mould them into whatever shape they might think proper; to which objection Hamilton replied that there was not a syllable in the plan "which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every state." [3] This conclusion he arrived at from his understanding of the general theory of a limited constitution applicable alike to the government of the nation and to that of each state.

Another Anti-Federalist objection was to the possible encroachment of the federal courts on legislative authority, — a fear which Hamilton pronounced to be "in reality a phantom." No encroachment was possible which could in any sensible degree affect the order of the politi-

[1] "The Federalist," No. LXXX.

[2] The extent of the judicial power of the United States is explicitly declared in the Constitution, Article III.

[3] "The Federalist," No. LXXXI.

cal system; a conclusion to which he arrived after considering "the general nature of the judicial power, the objects to which it relates, the manner in which it is exercised, its comparative weakness, and its total incapacity to support its usurpations by force." The power of instituting impeachments was a complete security; the judges could not possibly encroach upon legislative authority.

But the opponents of the plan objected to the provisions for inferior courts, declaring that they were superfluous, and that the duties imposed upon them could be as well, or better, performed by the state tribunals. To this objection the answer was as before, — the purpose of the framers of the Constitution to avoid local prejudices and partisanship. State judges holding their office during pleasure, or for a brief period, would not be sufficiently independent to be relied upon for an inflexible execution of national law.

Another objection which created much alarm in the Virginia ratifying convention was that a state might be sued by an individual in a federal court. This objection raised the great question of sovereignty, and on this subject Hamilton said: "An entire consolidation of the states into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers may remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States." [1]

He applied this doctrine in his answer to those who objected to the judicial Article, — that it authorized a suit to be brought against a state without its consent. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union." [2] He concluded, therefore, that

[1] "The Federalist," No. XXXII. [2] Id. No. LXXXI.

unless a state should surrender its sovereignty, the danger asserted by the Anti-Federalists was purely imaginary. He could see no purpose whatever in authorizing suits against a state for the debts it might owe an individual, because a recovery of the debt by a decision of the court could not be enforced by the state; and here he left the whole matter. His opinion was not sustained later by the supreme court,[1] but was sustained by the eleventh amendment to the Constitution, ratified in 1798.[2]

To the objection that the federal courts might transcend their authority, Hamilton replied that the judicial authority of the United States, as declared by the Constitution, was particularly specified; that its jurisdiction was limited by the terms of the instrument, and that there could be no invasion of the rights of the states.[3] It must be remembered that "The Federalist" was written before the first ten amendments were adopted, one of which, — the seventh, — is an explicit provision for trial by jury; and another, — the fifth, — is equally explicit in the trial of criminal cases. These two amendments answer nearly every serious objection advanced by the Anti-Federalists to the Constitution when it was before the ratifying conventions. The able argument made by Hamilton in "The Federalist," that the Constitution in its original form did not abolish or diminish the right of trial by jury, was not accepted by the country as final. The Constitution left too much to implication; the ancient right of trial by jury must be declared in direct terms. For this reason the seventh amendment was demanded and added.

Equally ineffective with the argument in defence of the omission to provide for jury trials was the argument of "The Federalist," advanced to meet one of the most serious accusations against the Constitution, — that it contained no bill of rights. Hamilton asserted that the Constitution itself was a bill of rights, and that in omitting a bill in the ancient form it left out no more than did some of the state constitutions.[4] In vain did he argue that

[1] In Chisholm *v.* Georgia, 4 Dallas (1793).
[2] See pp. 105, 106.
[3] "The Federalist," No. LXXXII.
[4] Id. No. LXXXIV.

a minute detail of particular rights was less applicable to a national system of government than to a system intended for a single state. In his opinion the constitution of each state was a bill of rights to the national Constitution and the Constitution would be the Bill of Rights of the Union. This opinion was almost universally rejected. James Wilson indeed held it, but the public was not convinced. The opposition may be said to have dictated the seventh amendment.

While Hamilton was writing the last numbers of "The Federalist," Virginia and New York were holding their ratifying conventions. Virginia sent up a bill of rights in twenty articles, and New York another in thirty-two. A few months later, North Carolina demanded a bill in twenty articles. The action of these states fairly reflected Anti-Federalist sentiments on the subject of guaranteeing, in the new Constitution, the ancient and undoubted rights commonly expressed in the bill of rights in the state constitutions. Rhode Island, which assembled in convention after the Constitution had been ratified and the new government inaugurated, adopted a bill of rights in twenty-one articles, and the Anti-Federalists in Pennsylvania, long before Hamilton's number on the judiciary was written in "The Federalist," had adopted, at Harrisburg, a bill of rights in fourteen articles. These five bills of rights, in ninety-three articles, constituted the quarry out of which Madison took the amendments ultimately adopted as the first ten. But at the time Hamilton wrote his opinion, in "The Federalist," that the Constitution was itself a bill of rights, he had no alternative. He felt that the Constitution must be defended as it left the hands of its makers.

In summing the teachings of this classic exposition, "The Federalist," it is well to keep constantly in mind that its purpose was to show the utility of the Union as embodied in the plan of government which we call the Constitution of the United States, and that this Constitution conforms to republican principles.

If it be asked, Where may a statement of these principles be found? "The Federalist" answers: in the state constitutions. In these the principles of republican gov-

ernment were formulated before the national plan of government was proposed. The several bills of rights in these earlier instruments declare briefly the political verities upon which popular government is founded. But these bills do not include the federal principles: these the authors of "The Federalist" deduced from the structure and operation of the confederations known to history, — and chiefly those of Greece and Holland.

It was not, however, upon the principles disclosed in these confederacies, that the authors of "The Federalist" relied for their principal support of the plan which they were urging upon the American people; rather did they depend upon the plain analogy of the proposed plan than upon the practically uniform plan in the state constitutions. With these the people were satisfied, for they believed that under the protection of these organic laws, their rights were safe.

It becomes necessary, therefore, if one would understand the various stages in the growth of popular government in America, to examine the state constitutions in force at the time when the national government was formed.

CHAPTER V

THE COMMONWEALTHS

More than ten years before the national Constitution was framed, or "The Federalist" was written, the people of the thirteen colonies transformed them into states, and some in Rhode Island and Connecticut organized them under written constitutions. The two New England states which thus continued their civil organizations under their ancient charters, possessed in them a working, written, organic law, which required no change when the civil affairs of these states were adjusted to the new order of things. Rhode Island, on May 4th, and Connecticut, on October 10, 1776, by act of assembly, declared that the colonial order had ended and that colony had become commonwealth.[1] Meanwhile other colonies had acted or were acting, and by 1780 were organized under written constitutions.

Vermont, though not recognized by Congress as a state until its admission into the Union in 1791, had at that time been organized under a written constitution fifteen years. Kentucky, admitted in 1792, and Tennessee, admitted in 1796, followed, in their constitutional organization, — the one, that of Virginia; the other, that of North Carolina. By 1800, the sixteen states had framed and adopted twenty-six constitutions, all conforming to republican principles, as these were understood at the time.[2]

The men, some seventeen hundred in number, who framed these constitutions, included many of the most eminent in the country: among them, Jefferson, Franklin,

[1] The charter, in Connecticut, was supplanted by the constitution of 1812; that in Rhode Island by the constitution of 1842.

[2] For the list of state constitutions and dates of their adoption, see p. 301 (note).

John Adams, Jay, Gouverneur Morris, James Wilson, Chancellor Wythe, Witherspoon, Read, Richard Caswell, George Nicholas, John Breckenridge, and Charles McClurg. The state constitutions reflect more perfectly than does the Constitution of the United States the theories of government which prevailed in America during the closing years of the eighteenth century. In "The Federalist" we find the classic exposition of principles on which the American system of government rests. In that work, as we have already seen, much is said of the state governments. Indeed the purpose in writing "The Federalist" was to show that the proposed federal government conformed to the principles on which the state governments were founded. The national and the state instruments were therefore in harmony: the one, applying republican principles in a general way, for the welfare of the whole; the others, applying these principles in particular ways for local purposes.

The state was conceived as a social compact; typically set forth in the Massachusetts constitution; formed for the security of the natural rights of men; typically expressed in the constitution of Virginia. The state was conceived to exist for the benefit of the individual, and individualism found expression in the words, "All men are created equal." The thought behind these words was the source of the revolt against feudalism. Out of the effort to formulate a new theory of the state grew the bills of rights which form the preambles to the state constitutions: a body of propositions, of which that in the Virginia constitution of 1776 is a type, formulating the political dogmas of the age. These bills of rights are the guarantees of the individual. The state exists for his benefit.

The popular objection to the national Constitution, as it came from the hands of its framers, was to its lack of a bill of rights: an indication of the importance attached to such a declaration; and the Constitution was ratified with the understanding that amendments, in the nature of a bill of rights, would promptly be made.[1] This insis-

[1] See chap. vi.

tence on the recognition, in the national instrument, of the fundamental rights of the individual citizen is the best evidence we have of the kind of government which the American people established in the eighteenth century. Each clause in a bill of rights in a state constitution is a survival of numberless attempts to formulate a permanent civil policy, and embodies the result of a long struggle. Indeed, a declaration of rights is an epitome of political history. To trace through the centuries the history of one of these propositions, for example, that on the right to bear arms, — or on trial by jury, — or on the right of revolution, leads the mind back to the beginnings of constitutional government. Magna Charta,[1] the Petition of Rights,[2] the English Bill of Rights,[3] and the American constitutions [4] mark off epochs in the evolution of constitutional government.

But the state constitutions went farther; they laid down the limits of power. As working models, this was their supreme feature. They were the first written plans of government, made by the people. They were the first, in history, which actually worked. The constitution of Massachusetts is the oldest written constitution now in force. Amendment has not altered its fundamental character. Yet this organic law dates back no farther than 1780. This suggests that the age of written constitutions is recent.

The first state constitutions were made by conventions, or by legislatures acting as conventions, and, with few exceptions, were promulgated. The earliest ones were revolutionary, and imperfect, because hastily made. Hence the adoption of new constitutions by most of the states before 1800. Change or amendment was demanded, because the first constitutions did not sufficiently limit the powers granted by the people; or did not clearly define the functions of the three departments, — legislative, executive, and judicial, — or did not specify the terms, duties, emoluments, and manner of choosing public officials. In other words, the older instruments were lacking in administrative detail; that is, in local

[1] 1215. [2] 1628. [3] 1689. [4] 1776.

fitness. The bills of rights were not changed, save by the addition, here and there of provisions, which, in the heat of the moment, were thought to embody permanent interests; as, for example, the provision respecting boundaries, in the constitution of Vermont, which state was involved in a bitter boundary controversy with its neighbors. Other temporary provisions occur in the early bills of rights.[1] Constitutional conventions have been prone to insert in bills of rights, the most stable part of a constitution, provisions of only temporary interest, but advocated strenuously at the time by the dominant political party. Usually, these provisions are dropped by later conventions. He who will read with care the bills of rights in our state constitutions will discover that their essential character is derived from their recognition of two doctrines: that of the social compact, and that of the natural rights of individuals.

The American bills of rights are suggestively silent concerning sovereignty. Save the reference to it in another article of the constitutions of Massachusetts (1780) and of New Hampshire (1784), which declares the relation of the state to the Confederation, the subject is not mentioned. Looking backward, we can see how the true concept of sovereignty must be worked out by events, by the actual administration of affairs. No definition of sovereignty, made in the eighteenth century, would have satisfied the social and political conditions of the nineteenth. The unwritten constitutions of the states; the sentiments and political opinions of the people, a knowledge of which we derive from the writings, the correspondence, and the political history of the time, prove that the prevailing belief was in the "freedom, independence, and sovereignty" of each state. The federal government was looked upon by the majority of the people as the agent of the states, — indeed, as their creation. In the eighteenth century, the governments of the states, as Hamilton declares in "The Federalist," held first place in the affections of the people. The national sentiments which now cluster around the United States government were un-

[1] See the first constitutions of Pennsylvania and Tennessee.

known. The change which time has wrought is best illustrated by the clause in the bill of rights of the constitution of Mississippi of 1890, which declares that the supreme allegiance of the citizen is due to the government of the United States.[1] No such idea is suggested in any state constitution of the eighteenth century. State sovereignty was unwritten law then as national sovereignty is now.[2] The popular concept of the national government in the eighteenth century may best be learned in the history of the alien and sedition acts, and that of the Virginia and Kentucky resolutions. That concept is expressed in the oft-used description of the general government, as one of "delegated powers," and the majority believed that these powers were delegated by the states.[3]

After stating, in constitutional form, the political dogmas of the age, the authors of these eighteenth century instruments set forth the scope and powers of the three departments of government, — legislative, executive, and judicial, — with manifest desire to co-ordinate them, yet so to separate them that neither should perform the functions of the other. This effort to separate the three departments is well illustrated in the constitution of Massachusetts, 1780, and that of Kentucky, 1792. The separation in each state was incomplete.

English constitutional history consists chiefly in the history of the struggle of the legislature with the crown, and notably the struggle of the House of Commons. That organ of government which controls the purse and the sword of the nation is most vital to national existence. At the time of the American revolution, Parliament had won in the long contest with the crown; therefore, Englishmen in America naturally conceived of the legislative

[1] Compare the constitutions of Maryland and Nevada, 1864.

[2] Justice Wilson's decision in Chisholm *v.* Georgia (1793), 2 Dallas, 419, and Chief-Justice Jay's decision, in this case, cannot be said to reflect public opinion at the time. The people did not yet comprehend *nationality*, as thus early defined by the supreme court. See chap. v, pp. 72, 73.

[3] For a detailed account of the subject "sovereignty," see Thorpe's "Constitutional History of the American People, 1776–1850," vol. i. chap. i, "The First Struggle for Sovereignty"; and for the growth of the idea of national sovereignty, see the same author's "Constitutional History of the United States, 1765–1895." 3 vols. *passim*.

as the most important department or function of the state, and, when they came to formulate written constitutions, they made the legislature the nucleus or centre of the civil system. They granted power to the legislature in general terms, with no thought of forbidding that which in later times came to be called special legislation. The colonial idea was of frequent elections and short terms for members of assembly, and the spirit of the revolution accented the idea. The colonial organization, — governor, executive council, assembly, and an appointed judiciary, — was easily perpetuated; the council being transformed into an upper House, which, after the British prototype, — the House of Lords, — was organized so as to secure greater permanency than the assembly. This was obtained by prescribing a longer term, and more exacting qualifications than those required of members of assembly. The senator must be an older man; possessing a larger estate and having a longer residence in the community than the assemblyman. The eighteenth century idea of the state, — that it rests on property and on persons, — was carried out in the organization of the legislature; the Senate representing property, the assembly representing persons.

The British model was further followed by giving the assembly the power to impeach, and the exclusive power to originate money bills. In the three states in which for a time the single legislature, or unicameral system, was tried, there were repeated demands for the bicameral system, as the only means of preserving those "checks and balances" which maintain the civil equilibrium.[1]

The basis of representation was white persons,[2] and the suffrage was limited to white males, except in New Hampshire, Vermont, Massachusetts, North Carolina, Tennessee, and New Jersey; in which states free men of

[1] Pennsylvania had the unicameral system, 1776–1790; Georgia, 1777–1789; Vermont, 1776–1836. The defects of the system were set forth by the Pennsylvania Council of Censors (see "Proceedings Relative to Calling"), the Conventions of 1776 and 1790, Harrisburg, 1825; also the many reports of the Vermont Council of Censors, whose elaborate statements seem trite.

[2] Georgia based representation on the federal number; constitution, 1798.

color, duly qualified by age, residence, property, and religious belief, might vote by the letter of the Constitution. For a time women voted in New Jersey (1776–1807), the term "inhabitants," which defined the votes in that state, including them. But white men only were elected to office.

Of the candidate for office and the office-holder, more exacting qualifications were demanded than of the voter; and chiefly a larger holding of real estate, a longer residence in the community, and of the candidate for governor, or for the Senate, an age greater than twenty-one years.

But the first constitutions, — and they embodied more liberal ideas than the colonial practices which preceded them, — were scarcely in force before demands for a yet more liberal system were heard. Democracy protested against religious and property qualifications and long terms of residence for the voter. It protested, as in Tennessee, and later in Massachusetts, against the property basis of government, and in the former it won its first victory when, in the new constitution of 1796, it succeeded in providing that a money bill might be originated in either House, — an innovation which many states have since followed. When the eighteenth century closed, democracy had so changed and amended the earlier constitutions that, speaking of the commonwealths in the aggregate, only vestiges remained of the religious and property qualifications for the elector which had been prescribed in 1776. But the new or amended constitutions, like the old ones, were confessions of faith in the wisdom and integrity of legislatures. In this respect the first state constitutions remind one of the faith of childhood. One smiles at the suggestion that the state can be kept in health and order merely by granting general powers to the legislature: its members of assembly chosen annually, its senators at least every two years. This primitive confidence in the mere mechanics of government is analogous to that so elaborately explained in "The Federalist." The *system* was everything. "Let the government be one of laws, rather than of men," was the confident desire of Americans in the eighteenth century.

Therefore the legislature was made the centre of the civil system.

Far different was the attitude of the people toward the governors. Confidence in the legislative was counterbalanced by distrust of the executive, — a condition of affairs brought about by the spirit of the revolution. The constitutional defence of the revolution, in the American mind, was based on the King's infraction of the social compact. Otis gave the thought voice when he argued against the writs of assistance, and the authors of the constitution of New Jersey in the preamble to that organic act plainly pronounced the King a law-breaker.[1] Colonial governors for more than a hundred years had been in ceaseless altercation with colonial assemblies, and the people had ever sided with the assemblies against the King's man.

In organizing the executive the authors of the early constitutions gave free rein to this hostile spirit of distrust and granted to governors only limited powers, for short periods of time. Annual elections, such as prevailed in New England, were supposed to prevent innumerable evils, and the exacting qualifications which hedged the executive office about, were considered a sure defence against the candidacy of incapable and unworthy men. The people of South Carolina exacted ten years' residence in the state, a clear, settled freehold worth £1500, belief in the Protestant faith, and the age of thirty years of the man whom they elected governor; and they gave him a term of only two years, and made him ineligible for a second term till four years had passed.[2] New Hampshire, Massachusetts, and Pennsylvania required a residence of seven years; Georgia, of six; Maryland and North Carolina, of five. Ten of the constitutions prescribed a property-qualification varying from five hundred acres to £5000, and in states which prescribed no property qualification, — Vermont, Delaware, and Kentucky, — the well-established custom was to elect as governors only men of known wealth and position. Equally

[1] New Jersey, 1776.
[2] Constitution, 1790; that of 1778 required £10,000 freehold.

exacting in letter, if not in spirit, was the requirement of belief in the Protestant religion which eight of the constitutions demanded;[1] and the term "Christian," used in two others,[2] meant Protestant. But long before these religious requirements were omitted in new constitutions, they became unpopular, and at least in one state, North Carolina, were ignored.[3] The change cannot be said to have come over the public mind until the nineteenth century was in its second decade.

The governor was popularly conceived to be a military man, — at least, *ex officio*, — and his civil duties were merely "to execute the laws." His power of appointment was limited, and there were few offices to be filled. Not all the constitutions gave him the veto power, but, somewhat paradoxically, much importance was attached to his messages, which formed important contributions to the newspapers of the day. They remain an instructive record of public events.[4] The constitutions provided for filling vacancies in the executive office, as in New York, by the accession of the lieutenant-governor,[5] which may have been the precedent for a similar provision in the national Constitution. But most of the states had cumbersome plans for the succession.[6] No change in our state governments is more notable than that in the executive department. The rigorous use of the veto power — the activity of the governor in filling offices, his political influence in legislation, and, in some states, his power to veto or to cut down items of expenditure — suggest how widely different is our conception of the executive from that of our ancestors. Their idea of a governor was of an official whose powers were few and limited.

The state judiciary at first was the colonial system in new hands. English precedents and practice yielded but

[1] New Hampshire, 1776, 1784, 1792; Vermont, 1777; New Jersey, 1776; Pennsylvania, 1776; North Carolina, 1776; South Carolina, 1790.

[2] Massachusetts, 1780; Maryland, 1776.

[3] See the debate on eliminating the word "Protestant" from the constitution, North Carolina, 1835.

[4] Niles's *Register*, which began during the second decade of the nineteenth century, regularly published the governors' messages.

[5] Constitution, 1777.

[6] Delaware, 1792; South Carolina, 1778, 1790, and others.

slowly to the spirit of democracy, — "the levelling spirit," as the Tories and High Federalists were wont to call it. The common law forms were adhered to, with no thought of change. Save on the frontier, where the courts were usually composed of men not learned in the law, there was little to indicate any change from colonial times in the administration of justice. Most notable was the separation of legislative and judicial functions by the elimination of the executive council as a court of appeal, and by the organization of courts of last resort. Much complaint was heard at the time the revolution broke out, of "the law's delay and the insolence of justice," and that that complaint was well-founded is attested by no less authority than the Declaration of Independence.

The authors of the first constitutions attempted to remedy public evils by simplifying legal processes; by organizing courts of various jurisdiction, by removing judges wholly from participation in other than judicial business, and, by adopting a system which, in its working, would hasten litigation to an end, and make the administration of justice accessible to all.

Yet the articles on the judiciary in the early constitutions throw little light on the actual system in force. One must know the old *nisi prius* practice and the rules of court; one must travel the circuit with judge and with counsel, before he can understand the state judiciary as it was organized in the eighteenth century. The most elaborate article on the judiciary was inserted in the Maryland constitution of 1776.

As yet, executive appointment of judges for a long term, — usually for life, or good behavior, — was the notable characteristic in most of the states. Democracy did not lay its hands on the judiciary, in the eighteenth century; as yet it only eyed the courts with longing to fill the bench with favorites elected by the people. The federal judiciary remains a monument of eighteenth century wisdom. Down to 1803, judges were appointed by governors. Ohio began the reform in appointment by intrusting it to the legislature. The popular election of judges was the next step, delayed till 1840. By the eighteenth century constitutions the courts and all their

officials were withheld from popular control. The governor nominated, and the Senate, or upper House, approved or rejected appointments. This was in accord with colonial and British precedents. But before the century closed, democracy was clamoring for the election of justices of the peace, district attorneys, and clerks of the courts, and the more ardent innovators were theorizing on the popular election of judges. The people controlled the legislative and, in most states, the executive, though in some the governor was chosen by the legislature. The next step in popular government was to organize the judiciary on the basis of popular elections. As yet, this innovation was in the stage of mere discussion.

The revolutionary age was productive of legal and judicial minds of the highest order, and the national Constitution reflects the wisdom of Ellsworth, Johnson, Hamilton, Sherman, Paterson, Wilson, Wythe, Ingersoll, Pinckney, and Gouverneur Morris. This galaxy of legal lights shone with a lustre scarcely brighter than that which fell from the minds that gave the states their organic laws. It was the age of John Jay and John Marshall, of Felix Grundy and John Sloss Hobart, of William Cushing, of Thomas McKean, and Theophilus Parsons, and it was to the hands of such as these that the judicial and legal affairs of the states were first intrusted.

Each constitution was adapted to the wants of the people of the state, and was an organic act separate and apart from the fundamental law of every other state, yet there were two prevailing types of constitutions: the northern, — that of Massachusetts; the southern, — that of Virginia. New states followed old models, as Kentucky that of Virginia, and Tennessee that of North Carolina. Vermont copied after the constitution of Pennsylvania. New York, early cosmopolitan, framed its first constitution with remarkable anticipation of the wants of the future; as it were, a nineteenth century instrument made in the eighteenth century. New Jersey, like New York, anticipated the future, but it is to the judicial system of New Jersey that we look to-day for the exemplification of the system in force, commonly in

the states, in the eighteenth century. Pennsylvania and Delaware differed but slightly in their organic laws. The constitution of Maryland was an example of elaboration and detail not found in any other commonwealth. South Carolina made the most rigid provisions for the union of church and state, in its earlier constitutions, and Georgia, liberal in its general policy, affords the only instance of a state's basing representation on the "federal number," [1] as the provision for representation of three-fifths of the slaves was called, after the adoption of the national Constitution.

The early state constitutions, with the exception of that of Maryland, were much briefer instruments than those framed by conventions in our day. Having incorporated a bill of rights and articles organizing the legislative, the executive, and the judicial departments, the framers of these instruments were usually content to make an end. The elaborate administrative features of a modern state constitution are the civil growth of years.

The characteristics of these early fundamental laws are the characteristics of the political ideas of their age: a limited suffrage, a government based on property and persons, a legislature vested with general powers, an executive vested with limited powers, and an appointive judiciary, state sovereignty, federal agency, and slight, if any, notion of United States citizenship. The state was conceived to exist for the individual, — a social compact made and maintained for the protection of his natural rights.

But democracy was writhing under restrictions, and was raising its voice for their abolition, and for direct participation in the control of public affairs.

At the time of the founding of the present national government, the individualistic forces of the country were on the side of the state governments, and this disposition of power was bound to remain unchanged so long as — to use the words of Hamilton — the government of the United States was not "able to address itself immediately to the hopes and fears of individuals, and to attract to its

[1] Georgia, 1798.

support those passions which have the strongest influence upon the human heart." [1] The national government, if it would attain years and vitality, "must possess all the means and have a right to resort to all the methods of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular states." [1]

Here was clearly stated the condition which should determine the fate of the national plan. But in the ultimate revolution of civil forces in America, state and nation were alike to embody and to express, in their evolution, that general law which is slowly working out the distinctive character of popular government.

[1] "The Federalist," No. XVI.

CHAPTER VI

RATIFICATION AND AMENDMENT

In the closing hours of the federal convention, resolutions were adopted commending the Constitution to the people of the states, and a special letter was prepared to accompany it to Congress.[1] The prospect of its ratification was gloomy. Nearly one-third of the delegates in the late convention had refused to sign it, and it was certain that they would oppose it in their own states. The national party was strongest at the commercial centres; the state party could depend upon the support of the rural districts. The numerous emissions of paper money by the states had pleased most of the rural communities, but had alarmed, and in many cases ruined, the merchants and traders in the towns. The business men of the country were likely to welcome any plan which offered relief and assurance for the future. The Congress of the Confederation had lost prestige and was not in the thought of the people. Its sessions were poorly attended, and occasionally weeks would pass when a quorum was with difficulty gathered. There were men influential in Congress who would oppose the Constitution, and the state party claimed that its defeat was assured. The only part which Congress had to play in the matter was to submit it to the governors, who in turn should submit it to conventions specially elected to consider it. But Congress must take the first step.

As soon as the instrument was received in Congress, Richard Henry Lee and other leaders of the state party

[1] The proceedings and debates in some of the ratifying conventions are given in Elliot's "Debates"; for the authorities in New Hampshire, Vermont, Massachusetts, New York, Pennsylvania, New Jersey, Delaware, Maryland, North Carolina, and Georgia, see the author's "Constitutional History of the United States, 1765–1895," vol. ii.

began the attack. They demanded a bill of rights; they objected to a Vice-president; they thought it dangerous that a law regulating commerce could be passed by a mere majority. However, Congress was not authorized to amend the proposed plan, but only to hand it on to the states. The contest in Congress, therefore, was over the manner of expressing approval or disapproval of the new plan. The national party, to which by this time the term "Federalist" had been given, as the term "Anti-Federalist" had been given to the state party, though desiring that Congress should formally approve the Constitution, soon discovered that nothing of this kind could be hoped for. The best they could secure was a submission to the states without comment by Congress. The two parties were so evenly balanced that neither could control Congress; the result was a compromise, on the 28th of September,[1] that the Constitution should be sent to the states with the unanimous consent of Congress but without comment. It was sent forth to meet its fate in the state conventions, any nine of which approving it could thereby make it the supreme law of the land.

Congress was not the first body to act on the Constitution. It had been formally presented to the Pennsylvania legislature by Franklin and his colleagues on the morning after the convention had adjourned. A contest immediately arose in that legislature over the question of calling a ratifying convention. The Anti-Federalists resorted to obstructive tactics and chiefly to absenting themselves, so as to prevent a vote, but the Federalists by force compelled the attendance of a quorum, and passed an act calling a convention. It met in Philadelphia on the 21st of November. Its most distinguished member was James Wilson. The Anti-Federalist delegates attacked the new plan as a clear violation of the rights of the states and a menace to their safety. Wilson and his federal colleagues attempted to answer these objections by showing that the Constitution was republican in form; that it bore a close analogy to the state constitutions, and that it would remedy all the defects of the old articles. The Anti-

[1] 1787.

Federalists replied that the new plan would establish a consolidated, not a federal government, and to this opinion they clung to the end. Wilson made a defence of the Constitution which remains a classic exposition of its scope and purpose; but the Anti-Federalists, unconvinced, presented a petition with seven hundred and fifty signatures, asking for amendments and particularly for a bill of rights. The ballot was then taken and the Constitution was ratified by a vote of two to one.[1] Though Pennsylvania was the first state to receive the Constitution, it was the second to ratify. Delaware had ratified a week before, unanimously.[2] Eleven days later New Jersey,[3] followed by Georgia, also ratified unanimously.[4] On the day before Georgia ratified, Connecticut met in a convention, which, after nine days' session, ratified by a vote of three to one.[5] There was little contest in Connecticut. It was one of the small states and realized that it could receive only benefits under the new plan.

On the day the Connecticut convention adjourned, that of Massachusetts assembled and was in session nearly a month, during which time the new plan was debated in detail. The state had been the theatre of Shays's rebellion, and some who had participated in that insurrection had been returned as delegates. Elbridge Gerry, on his return home from the federal convention had begun a vigorous attack on its work, and chiefly because of its omission of a bill of rights. The Massachusetts convention was the largest that assembled, having three hundred and sixty-four members, of whom the majority were Anti-Federalists. The hope of the Federalists, therefore, lay in political strategy. John Hancock, who at heart was an Anti-Federalist, was made president of the convention, and was won over to the support of the new plan by the promise of political honors. Samuel Adams, whose attitude was in doubt, was won through the influence of the working-men. The weight of ability in the convention lay with the Federalists.

It was the supposed undemocratic character of the new

[1] December 12, 1787; 46 to 23.
[2] December 7, 1787; 30 to 0.
[3] December 18, 1787; 38 to 0.
[4] January 2, 1788; 26 to 0.
[5] January 9, 1788; 128 to 40.

plan of which the Anti-Federalists most complained; only amendments and a bill of rights could give it the needed qualities. Fully conscious of the strength of their opponents, the Federalists planned a compromise. To the amendments demanded, the Federalists should give their support. The ambition of Hancock should be satisfied, and Samuel Adams should be induced to bring to the support of the Constitution an anti-federal vote sufficient to ratify it. Many of the Anti-Federalists wished to adjourn and await the action of other states, but the compromise plan was carried out; Hancock was re-assured of his election as governor, and was told that he might become Vice-president. Nine amendments were prepared of which Hancock was made to appear the author. Though Adams saw little in the Constitution which he admired, he was too shrewd a politician not to recognize the significance of the demand which came up from the business men of the state for ratification. The vote was taken and the Constitution was adopted, though only by a majority of nineteen votes, in a total of three hundred and fifty-five.[1] The news of the adherence of Massachusetts encouraged the Federalists in other states.

In Maryland the people were friendly, but the political leaders unfriendly, to ratification. The convention in that state was therefore composed of a powerful majority in its favor, somewhat impatient to ratify. After a week's debate, the vote was taken and the Constitution stood approved by more than five to one.[2] The Anti-Federalists, exasperated by federalist contempt of their objections, demanded twenty-eight amendments, but to these the Federalists gave slight attention. Here as in Pennsylvania the principal objection to the Constitution was to its supposed embodiment of a consolidated government.

The people of South Carolina, which was the next state to act, composed an agricultural community, too long agreeably familiar with over-issues of paper money and laws violating the obligation of contracts. The people were jealous of slavery and fearful lest laws of a federal character might impose taxes on slaves. As in Pennsyl-

[1] February 16, 1788; 187 to 168. [2] April 28, 1788; 63 to 11.

vania so in South Carolina a sharp contest arose in the legislature over the question of calling a convention, and during the debate nearly every anti-federal objection and every federal reply was heard. The Anti-Federalists lauded the Articles of Confederation and especially state sovereignty. They deprecated the consolidation of power in the proposed government and the limit of time for the importation of slaves. Especially did they disapprove of the clause forbidding the states to issue paper money. But a convention was finally called, among whose delegates were John Rutledge, Charles Pinckney, and Charles C. Pinckney, who had been members of the federal convention. These leaders made a vigorous defence of the new plan and answered every anti-federal objection to it. The Anti-Federalists were in the minority and were forced to pursue a policy of obstruction, but the best they could secure was the adoption of four amendments, whereupon the Constitution was ratified by a vote of more than two to one.[1]

The ninth state to convene was New Hampshire, an agricultural community, among whose people the proposed plan did not stand in high favor. The influence of Massachusetts was felt, and the majority of the delegates chosen to the Exeter convention were undoubtedly Anti-Federalists, as was proved by the conduct of their opponents in not venturing to press the vote lest the Constitution should be promptly rejected. The best that the friends of the new plan could do was to adjourn and carry on a campaign of education. While the convention stood adjourned, Maryland and South Carolina ratified, the news reaching New Hampshire early in June. The effect was plainly visible when the delegates re-assembled at Exeter on the eighteenth of the month. Three days later the vote was taken and the Constitution was ratified, though only by a majority of eleven votes.[2] As in Massachusetts, the Federalists had to pay the price of ratification; they agreed to sixteen amendments which their opponents demanded should be added to the Constitution. New Hampshire being the ninth state to ratify, the Con-

[1] May 23, 1788; 149 to 73. [2] June 21, 1788; 57 to 46.

stitution became, by its own terms, the supreme law of the land, but no one thought of attempting to inaugurate the new government until the three remaining states, which had been represented in the federal convention, — Virginia, New York, and North Carolina, — should take action; for these three states were holding conventions and their decisions were daily expected.

In Virginia the division of parties was close and the prospect of ratification uncertain. Randolph and Madison, who had been prominent in making the Constitution, were elected delegates, as were John Marshall, James Monroe, Patrick Henry, and a score more of eminent Virginians. There had been little struggle in the legislature over the calling of a convention, but the Anti-Federalists, conscious of their strength, made no serious opposition. Their spokesman at Richmond was Patrick Henry, who vehemently attacked every detail of the Constitution, and remained to the end of the debate unconvinced that it possessed notably desirable features. It was he who named the last clause on the powers of Congress "the sweeping clause"; and it was he who made the most powerful speech against the Constitution heard in any convention. The new plan was, he said, that of a consolidated government, and a consolidated government was the worst government that could be adopted for America. He was sustained by George Mason, lately a member of the federal convention; by James Monroe, destined to be the fifth President of the United States; by William Grayson, who had opposed the Constitution in Congress, and by a number of lesser though highly able men.

The defence of the Constitution was taken up by Madison and Marshall, and to them the final victory in Virginia was largely due. One other eminent Virginian, who was not a delegate at Richmond, was perhaps more influential in the state than the entire party of Anti-Federalists. Washington, from the moment when the circular letter had been sent to Congress commending the Constitution, had not ceased to write and speak on behalf of the new plan. Had he not been a member of the Philadelphia convention, it may be doubted whether the Con-

stitution would have been ratified by Virginia. Jefferson was absent as minister to France, but he carried on a close correspondence with Madison and with the anti-federal leaders, and thus kept in touch with the course of events at home. His influence was very great, — second indeed only to that of Washington. He favored ratification and an amendment of the Constitution, for he knew too well the defects of the old Articles. On the 26th of June, after a session of twenty-six days, the vote was taken. Twenty amendments were proposed, and a bill of rights in twenty articles. The Constitution was then ratified by a meagre majority of ten votes.[1] It may be said that the ten votes which saved the Constitution in Virginia represented the influence of Washington. A strong effort was made to make the ratification conditional, but happily this failed.

While the people of Virginia were discussing the Constitution, New York met in convention at Poughkeepsie for the same purpose. The state was agricultural, and, except in the city of New York, strongly anti-federal. There seemed little hope that the Constitution would be approved. At the head of the opposition stood the governor, George Clinton, who was actively supported by a powerful personal following. The federal leaders were Hamilton, John Jay, who at the time was secretary of foreign affairs in the Confederation, and Robert R. Livingston, the chancellor of the state.

The Anti-Federalists objected to every important feature of the new plan and especially to the powers of Congress and the organization of the Senate. They complained of the omission of a bill of rights. Finally, after a bitter contest, Hamilton and his federal colleagues, by sheer intellectual effort and a willingness to compromise, won the day; but it was a narrow escape. A change of two votes would have defeated the Constitution. However, it stood ratified,[2] and the convention sent up twenty-four amendments and a bill of rights in thirty-two articles. The recent decision of New Hampshire and Virginia undoubtedly influenced that of New York, which had no desire to be isolated from the Union, though

[1] June 26, 1788; 89 to 79. [2] July 26, 1788; 30 to 27.

the Anti-Federalists in the state claimed that the state was able to maintain a separate government.

It was while the Poughkeepsie convention was in session that the series of articles made their appearance in several New York papers, addressed to the people of the state of New York urging them to ratify the Constitution. They appeared over the signature *Publius*, which, it was soon discovered, was a pseudonym for Hamilton, Madison, and Jay. These papers, known collectively as "The Federalist," comprise, as we have seen, the classic exposition, in the eighteenth century, of the American system of government.[1] They were given a wide circulation by the Federalists and had some influence in determining the decision of Virginia and New York. For a time it had seemed that New York would ratify only conditionally, but through the efforts of Hamilton this disaster was averted.

A few days before the New York convention adjourned, the people of North Carolina assembled at Hillsboro, in the persons of two hundred and twenty-eight delegates, to consider the Constitution. There were no large commercial centres in the state; its people were agricultural, were widely scattered, and hostility or indifference to the Constitution prevailed among them. James Iredell and a few federal colleagues struggled bravely to carry ratifications, but theirs was a hopeless task. The Anti-Federalists, realizing their power, merely tolerated discussion. They attacked every provision of the Constitution and pronounced the entire plan objectionable. The adverse vote would be only a matter of majorities. The Federalists were helpless; they could only utter warnings. Finally, after two days' debate, the vote was cast. North Carolina demanded a bill of rights in twenty articles and twenty-six amendments; if these were incorporated she would ratify the plan. But on a clear vote the Constitution would have been rejected by more than two to one.[2] This decision left the state in an anomalous position.

Meanwhile eleven states having ratified, the new national plan had been inaugurated. Congress had organ-

[1] See chaps. iii, iv. [2] August 4, 1789.

ized the House on the 1st, the Senate on the 6th of April, 1789, on which latter day the electoral votes had been counted. Washington had been chosen President unanimously, and John Adams, the next highest candidate, was Vice-president. On the 30th of April Washington was inaugurated in New York City. Within a few days he sent to the Senate his list of civil appointments: cabinet officers, federal judges, and minor officials. All were confirmed. Before the summer was over, all departments of the new government were in operation.

Until this time the Constitution had been scarcely more than a plan on paper. Its inauguration as an actual government worked a great change in public sentiment to which the people of North Carolina responded. They had hesitated to approve it before, being fearful that their rights as a state might be impaired, but the disposition of the Federalists, who were in the majority in the new government, to give respectful consideration to the many amendments which had been proposed by the conventions, now allayed opposition in North Carolina, and on the 16th of November, 1789, its people again assembled in convention and five days later ratified the Constitution,[1] by a vote of more than two to one. They insisted, however, upon the adoption of amendments and of the bill of rights which they had sent up before.

In the aggregate the vote in the ratifying conventions was two to one in favor of the Constitution, but the votes in detail made a very different showing. A change of two in New York, of five in Virginia, and of ten in Massachusetts, on the final ballots, would have rejected the Constitution and left the country with chaos impending. Connecticut, New Jersey, Delaware, and Georgia suggested no amendments, and none came officially from Pennsylvania, though the Harrisburg conference proposed fourteen. But the remaining states had demanded, in the aggregate, one hundred and forty-five articles as amendments, and ninty-three articles as bills of rights.[2]

[1] November 21, 1789; 193 to 75.

[2] The amendments proposed by the different conventions are given with the acts of ratification in the "Documentary History of the Constitution," vol. ii; most of them are given in Elliot, vol. i.

In every instance the amendments were demanded by the minority. The narrow margin by which the Constitution had been ratified, and the strong opposition which had been manifested, both to its form and to its possible administration, made it the first political duty of the new government to respect and utilize the demands of the minority, and to submit such amendments to the states as would be likely to allay further agitation. In the House of Representatives, Madison was the leader of that nascent party soon to be called the Democratic-Republican, and he was deeply anxious to remove every obstacle in the path of the new government. On the 4th of May, 1789, he gave notice of his intention to bring up the subject of amendments at an early day, and on the 8th of June he moved that the house go into committee of the whole for the purpose of considering them.

The opinion of Hamilton, Wilson, and Pinckney,[1] that the Constitution itself was a bill of rights, was not accepted by the Anti-Federalists. Hamilton or Pinckney, or, indeed, any member of the late convention, could point out many passages in the Constitution which were transcripts of clauses in bills of rights in the state constitutions.[2] Jefferson had urged the addition of amendments and had pronounced Wilson's opinion, that the Constitution itself was a bill of rights, a "*gratis dictum*, the reverse of which might just as well be said,"[3] and Jefferson undoubtedly expressed the convictions of those represented by the minority in the ratifying conventions. On the other hand, the Federalists looked upon amendments as untimely and superfluous.[4] But the request of the general assembly of Virginia,[5] that Congress should call another convention, and the evidence of discontent in all

[1] "The Federalist," No. LXXXIV; Pinckney in the South Carolina Convention; Elliot, vol. iv; Wilson's speech at the State House in Pennsylvania and the Federal Constitution, pp. 143–150; and in the convention, Id. pp. 252–254.

[2] See for the sources and authorship of the Constitution the author's "Constitutional History of the United States, 1765–1895," vol. iii, pp. 463–515.

[3] Jefferson's Works, vol. ii, p. 329.

[4] McRee's "Iredell," vol. ii, p. 265.

[5] Annals, 1789, pp. 258–259.

parts of the country, made it quite certain that the states were prepared to adopt amendments which would embody the purpose of all that had been suggested. Objections to the Constitution were two-fold, — to its structure, and to the probable administration of the government by the Federalists. Their opponents were determined to remedy the one and to prevent the other.

On the 8th of June, Madison submitted his plan. He would insert eight amendments here and there in the Constitution. The preamble should be preceded by a statement that power is derived from the people; that government is instituted for their benefit, and that it is their right to change it from time to time.[1] He found the precedent for this part of his plan in the Declaration of Independence, in most of the state constitutions, and in amendments which had been suggested by nearly all the conventions. He would strike out the clause on the apportionment of representatives,[2] and would substitute a provision for a variable ratio, with a final limit of membership. For these changes he found immediate precedent in the amendments suggested by the Harrisburg conference, and from those which came up from Massachusetts, Virginia, New York, North Carolina, and New Hampshire. He would change the clause relating to the compensation of senators and representatives,[3] so that no Congress could increase the salary of its own members: embodying amendments demanded by Virginia, New York, and North Carolina.

His fourth amendment was the insertion of ten new clauses,[4] forbidding legislation which might abridge freedom of worship or infringe the rights of conscience; making the rights of freedom of speech and of the press inviolable; securing the right of peaceably assembling and the right of petition; securing the right to bear arms, and the exemption of all who on account of religious scruples might be unwilling to go into military service in person; forbidding the quartering of soldiers in private houses without the consent of their owners; exempting

[1] Annals, 1789, pp. 451–453.
[2] Article I, section 2, clause 3.
[3] Article I, section 6, clause 1.
[4] Amending Article I, section 9.

a person on trial from being a witness against himself; forbidding the seizure of private property for public uses without just compensation, and taking life, liberty, or property without due process of law. From the English bill of rights of 1689 he took the clause on excessive bail and fines, and cruel and unusual punishments, a provision confirmed many times by colonial assemblies, embodied in the declaration of rights of 1765, found in six of the state constitutions, and demanded as an amendment by Pennsylvania, Virginia, and North Carolina. The people should be secured in their person and property against unreasonable seizures and searches, and warrants should not be issued without probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized. These provisions were found in the Declaration of Independence, in nearly all the state constitutions, and had been demanded as amendments by four states.

In criminal prosecutions, the accused should enjoy those rights and privileges as to witnesses and counsel with which the country had long been familiar. Madison found a precedent for this provision in Magna Charta; in its confirmation by colonial legislatures; in the petition of right of 1628; in the declaration of rights of 1765; in the Declaration of Independence; in nine of the state constitutions, and in the amendments demanded by five states. He also proposed that the exceptions made in favor of particular rights, in the Constitution, should not be construed to diminish others retained by the people, or to enlarge the powers delegated by the Constitution, — for which provision the constitutions of three states and the amendments suggested by seven were the immediate precedent. It will be observed that these ten clauses, which he proposed to insert, corresponded closely to the amendments finally adopted. His fifth amendment[1] would forbid the violation of the rights of conscience, of the freedom of the press and of trial by jury; a limitation which found precedent in all the state constitutions and in the amendments proposed by five of the conventions.

[1] Amending Article I, section 10, by inserting a new clause between one and two.

His sixth amendment [1] forbade appeals in cases in which the value in controversy did not amount to a fixed number of dollars, and no fact triable by jury according to the course of the common law should be re-examinable except as consistent with its principles. This amendment had been asked for by four conventions. His seventh amendment substituted two new clauses for the provision respecting the trial of crimes.[2] His purpose was to secure the convenience of suitors, to provide for a change of venue if necessary, and to amend the practice of the common law. His provision read much like a rule of court, but it had a precedent in the constitutions of five states and in the amendments demanded by six of the conventions. His eighth amendment would make a new article,[3] and was intended to secure the complete separation of the three departments of government, and to prevent the exercise of the power of one by either of the others. Its second clause provided that the powers not delegated by the Constitution, nor prohibited by it to the states, were reserved to them respectively. The first part of his article was taken from the constitutions of six states, and was demanded by three of the ratifying conventions. The second part was found in the constitutions of three states and had been demanded by six of the conventions.

Thus Madison's eight amendments embodied provisions already in force in most of the state constitutions and demanded as amendments by many of the ratifying conventions. Several of his provisions were as old as Magna Charta.

The first thought on reading Madison's amendments is of the identity of the political principles which they embody with those principles of republican government cited throughout "The Federalist." They confirm, too, the opinion already expressed. The popular conception of republican principles in 1789 was of those enunciated in the organic laws of the states. The essential feature of Madison's purpose was, therefore, to bring the written

[1] Amending Article III, section 2, by adding a second clause.
[2] In Article III, section 2, clause 3.
[3] To follow Article VI.

expression of the national government into complete harmony with the principles of the state governments.

He based his general argument for his amendments on their importance as barriers to protect the people against the federal government and as checks and balances to prevent each of its departments from encroaching on the other. The executive, he said, was the weakest department; therefore, the power of the legislature should be limited. He was unwilling to make Congress the final judge of all public matters. He could not understand why the federal government should not be restrained by the federal Constitution, as the governments of the states were restrained by their constitutions. Their legislatures were the guardians of popular liberty; Congress could not safely be entrusted with it. Thus, his amendments forbidding Congress to fix its own compensation, or to infringe the rights of conscience, freedom of the press, or trial by jury, were equally necessary. The article on the federal judiciary should be amended so as to obviate the great inconvenience to which the people would be subjected in being forced to travel great distances in cases of appeal, or in actions for a small debt in a case pending in the supreme court. Having briefly explained all his amendments, Madison moved that they be referred to a select committee.

But the Federalists saw little necessity for this, and thought that Congress should proceed with the more pressing matter of the revenue bill, then pending. Gerry pointedly remarked that the salvation of the country depended upon the establishment of the government, whether or not the Constitution was amended; but he was favorable to Madison's amendments, as they might win North Carolina and Rhode Island, which had not yet ratified. Roger Sherman declared it a matter of wonder that the Constitution had been adopted at all. Of the eleven states which had ratified, the majority had not proposed amendments, and he was doubtful whether any which might be proposed by Congress would be approved by the states, because there was so slight demand for them. Would it not be better to wait the test of experience and thus determine what amendments

were necessary? Fisher Ames boldly accused Madison of angling for popularity, and most of the Federalists were content to pronounce the amendments needless.

But Madison was fixed in his determination to carry them through. Debate should be cut short and every proposition of a doubtful or unimportant nature should be excluded.[1] He wished to avoid the risk of a second federal convention. The amendments, said he, would not only conciliate all parties but would put public affairs "into an auspicious train."[2] The House decided at first to refer the amendments to the committee of the whole, but finally, and owing largely to Fisher Ames's activity, they were handed over to a select committee of one from each state. Among the eleven appointed were Madison, the chairman; and Baldwin, Sherman, Gilman, and Clymer, who had been members of the federal convention. On the 13th of August, the committee reported a series of amendments in eighteen clauses, which in substance were Madison's propositions.[3] In the debate which followed, the Federalists objected to the report because, they said, if the amendments were inserted in the Constitution it would appear, unless the archives of Congress were searched, that Washington and other worthy men in convention had signed an article which they had never had in contemplation. Gerry argued that Madison's plan of incorporating the amendments accorded with the evident intent of the Constitution itself; Sherman urged that all the amendments should be added at the end of the Constitution so as to avoid confusion; but the majority favored incorporation, and Sherman's motion was lost. Later the matter was reconsidered and his suggestion prevailed.

On the 14th of August the amendments were taken up in their order and gradually given the form in which they now stand. The proposition to establish a minimum and a maximum number of members in the House did not meet with great favor. The difficulty was

[1] Madison to Randolph, August 21, 1789; Works vol. i, p. 490.
[2] Madison to Jefferson, December 12, 1788, Works vol. i, p. 446.
[3] The committee's report in Annals, 1789, pp. 733–790; House Journal, p. 85.

to fix a number which would prove adequate to the public business, and no two members agreed as to what this number should be. The number of members in the state legislatures was determined by the number of districts and by population, both of which factors frequently changed. It was finally decided that the maximum membership should be two hundred. All agreed that no Congress should have power to increase the salary of its own members. Much of the discussion turned on the phraseology of the amendments, and respecting this Gerry had much to say and was largely instrumental in settling the final language of the clauses.

It was while the clause on the freedom of religion was under discussion that Gerry observed that in the ratifying conventions the difficulty between the two parties consisted in the willingness of the Federalists to ratify the Constitution as it stood, and the unwillingness of the Anti-Federalists to ratify until it had been amended. "Their names," he said, "ought not to have been Federalists and Anti-Federalists, but Rats and Anti-Rats," and he embraced the opportunity to accuse Madison of favoring a consolidated government. The debate on the rights of conscience, on freedom of the press, on the right of petition, and other rights, already guaranteed by custom and the state constitutions, was languid. Provisions in the state constitutions securing these rights were already recognized civil axioms. Now and then a member objected to the committee's report because it did not include some particular amendment demanded by his state, but the report was comprehensive and its omissions were all satisfactorily explained. When the discussion reached the provision that the enumeration of certain rights in the Constitution should not be construed to deny or to disparage others retained by the people, Tucker of Virginia, an Anti-Federalist, remarked that it meant the alteration of the state constitutions and could better be left to the state governments; he therefore moved to strike it out. Madison quickly replied that he considered it the most important of the whole list. It was equally necessary to secure the people against the infringement of their rights by either government, and the House sus-

tained him. The language finally given to the clause was suggested by Carroll, of Maryland.

Finally, the report of the committee of eleven, as amended, was handed over to a special committee consisting of Benson, Sherman, and Sedgwick, with instructions to arrange and report amendments, which they did on the following day [1] in seventeen articles. These were then sent to the Senate. Little is known of what was said of them there, but it is known that the federalist senators were strongly opposed to them; and that they were able greatly to modify the report; so much so, indeed, that when it reached the House that body refused to recede from its own propositions or to accept the report. Finally, on the 24th of September, the amendments were sent to a committee of conference, with the result that the House receded on condition that the Senate should agree to changes in two articles. On the 25th of September, the Senate concurred and the amendments, now cut down from seventeen to twelve, were adopted.[2] Of these, the last ten were speedily approved by the requisite number of states, and on the last day of June, 1790, Washington announced to Congress that they had been ratified.

The amendments supplied a bill of rights and satisfied the "public demand," as Jefferson had expressed it to Madison, in a letter written soon after the adjournment of the federal convention.[3] Washington had early declared his willingness to embrace any compromise that would save the country from ruin, and had been confident that the most violent opponents of the Constitution would peaceably co-operate in the organization of the government and be content to ask for amendments in the manner it prescribed.[4] But most of the Federalists looked upon the amendments as a rash innovation.[5] Pierce Butler spoke of them as milk and water amendments,[6] and Ames called them "rather food than physic, an immense amount

[1] Their report is in Senate Journal, August 25, 1789.
[2] Senate Journal, 1789; Appendix, Elliot, vol. i, p. 338.
[3] Jefferson to Madison, December, 1787, Jefferson's Works, vol. ii, p. 329.
[4] Jefferson's Works (Ford's Edition), vol. xi, pp. 299–321.
[5] Fisher Ames to George R. Minot, July 3, 1789; "Life of Ames," p. 165.
[6] McRee's "Iredell," vol. ii, p. 265.

of sweet and other herbs and roots for a diet drink."[1] But moderate men of both parties inclined to Madison's view, — that the amendments were necessary to secure the rights of conscience, freedom of the press, trial by jury, and protection against general warrants, and that they could not fail to conciliate the opposition.[2] Certain it is that from the time of their adoption, the opponents of the Constitution grew temperate in speech and at last vanished as a party.

The states had taken up the amendments willingly, and their ratification was in progress when North Carolina approved the Constitution. Maryland followed New Jersey, and North Carolina approved them in December, 1789. By the last of March of the following year five more states ratified. Another state could make them a part of the Constitution.

This state was Rhode Island. It had refused to participate in the federal convention, and for more than two years had taken no action on the Constitution. But this apparent apathy did not reflect the sentiments of many of its people. The Federalists in Rhode Island were the minority party, and for two years had struggled in the assembly in vain to pass a bill calling a convention. Seven times did the bill fail. The eighth time it was carried, but only by the vote of the governor, John Collins, who, on Sunday, January 17, 1790, decided by his vote that a convention should be called. Though the Constitution was now in force and the administration of Washington well under way, the seventy delegates who met at South Kensington, on the 8th of March, proceeded to discuss the Constitution as if its fate was in their hands. For sixty-five days, in two sessions of the convention, they debated, finding much to object to and little to approve. Finally by a meagre majority of two votes they ratified the Constitution, at the same time insisting on the adoption of eighteen amendments and a bill of rights in twenty-one articles, and this, when the Constitution had been in operation more than a year.[3]

[1] "Life of Ames," vol. i, p. 154.
[2] Madison's Works, vol. i, pp. 446–448, 463, 485–486.
[3] May 29, 1790; 34 to 32.

By this time eight states had approved ten of the amendments which Congress had lately submitted, and these ten embodied the substance of the reasonable demands of Rhode Island. Its legislature, now fully satisfied, gladly took up the congressional amendments, approved them on the 15th of June, and by its action made them a part of the Constitution.

Vermont for fourteen years had been an independent state and standing faithfully by the side of the other states throughout the revolution. It had long been engaged in a boundary dispute with New York, a calamity which undoubtedly prevented the Congress of the Confederation from including it within the Union. In October, 1790, this dispute was settled to the satisfaction of both states, and the last barrier was removed to the formal admission of Vermont. Early in January of the following year, its people, through their representatives, assembled in convention at Bennington to take action on the Constitution. There were only four vigorous Anti-Federalists among the one hundred and nine delegates. For five days the great question was discussed in a perfunctory way, and then the Constitution was formally ratified.[1] A month later Congress admitted the state into the Union. In November the state approved the ten congressional amendments. Virginia ratified them in December. Thus at the close of the year 1791 all the states which had participated in the revolution had ratified the Constitution; and all save three[2] had approved ten of the amendments which Congress had proposed.

Most of the framers of the Constitution were lawyers, and several possessed judicial minds of the highest order. The article on the judiciary, we are informed by Gouverneur Morris, received most critical attention, and passed from the hands of the convention to the committee on arrangement and style in as perfect a form as men familiar with political theories and grounded in legal practice could suggest. But on the subject of the judiciary, conflicting opinions had been maintained with so much pro-

[1] January 10, 1791; 105 to 4.
[2] Massachusetts, Connecticut, Georgia.

fessional astuteness, says Gouverneur Morris, that it became necessary for him only to select the phraseology when, as a member of the committee on arrangement and style, the rough draft of the Constitution was put into his hands with instructions to write it in final form. He wished not to alarm others or to shock their self love, and yet to express his own notions. The result was that the article on the judiciary "was the only part that passed without cavil."[1] In the ratifying conventions the article on the judiciary was viewed with alarm by the Anti-Federalists. They feared that the jurisdiction of the federal courts might extend to suits between citizens of a state and another state. Marshall, in the Virginia convention, had quieted George Mason's fears on this point by saying that it was not rational to suppose that a sovereign power, like a state, could be dragged before a federal court. A state might be a plaintiff, but it could not be made a defendant in a suit brought by an individual. If he had a just claim against the state, it was to be presumed that upon application to its legislature he would obtain satisfaction.[2]

The same idea was held by Hamilton, who declared that the alarm of the Anti-Federalists was upon very mistaken grounds, as it was inherent in the nature of sovereignty not to be amenable to the suit of an individual without its own consent. This, he said, was the general sense and practice of mankind and the exemption was enjoyed by the government of every state in the Union as one of the attributes of sovereignty. Such suits against a state would be contrary to the spirit and purpose of the Constitution. Recoveries could be enforced only by waging war against a state, and it was altogether forced and unwarrantable to ascribe to the federal courts, by mere implication and in contravention of pre-existing rights of the state governments, a power which would involve such consequences.[3]

The opinions of Marshall and Hamilton are sufficient, if taken in connection with the time and place of their

[1] Sparks's Morris, vol. iii, p. 323.
[2] Elliot, vol. iii, p. 555.
[3] "The Federalist," Nos. XXXII, LXXXI.

utterance, to establish the fact that the framers of the Constitution did not believe that a sovereign state could be sued by an individual or, to use a phrase of the time, could be dragged before a federal court. The full power of the general government was behind the states to support them in their judicial action, but was not behind the individual to support him in an action against a state. Through all the debates in the ratifying conventions ran the claim that the states would gain by assenting to the Constitution. Randolph, when presenting the Virginia plan in Philadelphia, spoke of the jealousy of the states respecting their sovereignty as a fact familiar to all. Without attempting to declare the truth or falsity of the doctrine that the states were sovereign, we must conclude that it was unquestionably the ruling idea in 1788. Time might prove the doctrine impracticable as a working principle, but the strength of the argument lay with the state-sovereignty school at the time the national government was formed. It dominated the ratifying conventions; it had been freely expressed in the federal convention. The national idea as it is now understood had to be worked out by the harsh tests of administration. It was not conceived at the time the Constitution was made. It is a product of a later time. If the idea of state sovereignty should prove destructive of the ends comprehensively proposed in the preamble of the Constitution, — a more perfect union, justice, domestic tranquillity, common defence, and the general welfare, — then ultimately the idea must be abandoned. The Fathers, as we frequently call our early statesmen, were opportunists, as all men must be in revolutionary times. Speaking of the work of the Fathers, Mr. Lincoln, in his Cooper Institute speech, undoubtedly laid down the true principle to follow in interpreting their work: "I do not mean to say that we are bound to follow implicitly in whatever our Fathers did; to do so would be to discard all the lights of current experience, to reject all progress, all improvements. What I do say is, that if we would supplant the opinions and policy of our Fathers in any case, we should do so upon evidence so conclusive and argument so clear that even their great authority fairly

considered and weighed cannot stand."[1] Time alone could tell whether the evidence would ever be so conclusive and the arguments so clear that the state-sovereignty doctrines of the Fathers could no longer be suffered to prevail. There can be no doubt that when the Constitution was adopted it was with the understanding that a sovereign state could not be sued in a federal court without its own consent.[2]

But among the Fathers there were some who did not hold this idea, and among them John Jay and James Wilson, who, it will be remembered, were appointed by Washington; the one chief-justice, the other an associate justice of the supreme court. In 1792, Alexander Chisholm, a citizen of North Carolina, brought suit against the state of Georgia in the supreme court of the United States, and thus "a question of uncommon magnitude, whether such a suit could be maintained," became an issue. The opinion of the court was given by Wilson. The question, he said, was whether the people of the United States formed a nation? He answered it according to his understanding of the principles of general jurisprudence, of the laws of nations, and of the constitutions and laws of the states. From the first two he developed the general notion of sovereignty and then proceeded to prove that the federal Constitution vested sovereignty in the United States and clearly gave the

[1] Lincoln's Works, vol. i, p. 604.

[2] Delaware in its second constitution, 1792, declared that suits might be brought against the state as the law prescribed; and Tennessee, in 1796, authorized such suits with the proviso that it must be brought by its own citizens. See Delaware constitution, 1831–1894; Tennessee, 1834–1870. The state constitutions authorizing legislation for bringing suits against the state are Wisconsin, 1848, Art. IV, sec. 27; California, 1850, Art. XI, sec. 11; Kentucky, 1850, Art. VIII, sec. 6; 1890, sec. 231; Indiana, 1851, Art. IV, sec. 24; Nevada, 1864, Art. IV, sec. 22; Missouri, 1865, Art. IV, sec. 21; Florida, 1868, Art. IV, sec. 19; 1885, Art. III, sec. 22; Mississippi, 1868, Art. XV, sec. 21; South Carolina, 1868, Art. XIV, sec. 4; 1895, Art. XVII, sec. 2; Alabama, 1867, Art. I, sec. 16; Pennsylvania, 1873, Art. IX, sec. 11; Washington, 1889, Art. II, sec. 26; North Dakota, 1889, Art. I, sec. 22; Wyoming, 1889, Art. I, sec. 8; such suits were forbidden by Illinois constitution, 1870, Art. IV, sec. 26; Alabama, 1875, Art. I, sec. 15; Arkansas, 1874, Art. V, sec. 20, declares that the state shall never be made defendant in any of her courts. But see Curran *v.* Arkansas *et al.*, 15 Howard, 304, 309; Clark *v.* Barnard, 108 United States, 436, 447; Beers *et al. v.* Arkansas, 20 Howard, 527.

court jurisdiction over a state in the Union. The state of Georgia was therefore amenable to its jurisdiction. He took issue directly with both Marshall and Hamilton, and claimed that the jurisdiction of the supreme court over a state was explicitly declared in the Constitution. A state could be made a defendant before the court; therefore it was amenable.[1] Jay, the chief-justice, supported him in an elaborate decision. He traced the history of the country from the outbreak of the revolution, and agreed with Wilson that the controversy before the court fell within the exact language of the Constitution. He went further than Wilson, however, and held that not only a state but the United States might be sued by any citizen with whom it might be in controversy, but with this difference: that in case of an action against the United States there was no power which the courts could call to their aid to compel execution of the court's decree. Therefore the case of a state and that of the United States were very unlike. But a state was suable by citizens of another state.

This was a new and an alarming doctrine, and its truth was denied by Justice Iredell in one of the most famous opinions in our legal history. He controverted the opinions of Wilson and Jay point by point. He held that the states were successors to the crown and, like the crown, could be petitioned but not sued. He denied that either the Constitution or the act establishing the federal courts[2] authorized Wilson's conclusions. The power of the court was to be strictly construed. The common law, he said, gave no precedent for Wilson's construction. Every state in the Union, save in those instances in which its sovereignty had been expressly delegated to the United States, was as completely sovereign as were the United States in respect to the powers surrendered to them. "The United States," said he, "are sovereign as to all the powers of government actually surrendered; each state in the Union is sovereign as to all the powers reserved." Reasoning thus from the British Constitution,

[1] Chisholm *v.* Georgia, 2 Dallas, 419 (1793).
[2] Act of September 24, 1789; Statutes at Large, vol. i, p. 73.

the common law, the practice of the colonial governments, the strict construction of the Constitution, and of the judiciary act of 1789, he reached the conclusion that the states were sovereign and could not be sued. The only remedy was by petition to the state legislature. But Iredell's opinion was not the decision of the court; that had declared that a state was suable in the federal courts, and it was a most startling conclusion of the whole matter. It practically reversed the Fathers, ignored the opinions of the ratifying conventions and also "The Federalist" itself.

The decision was handed down on the 18th of February, 1793, and, on the following day, Sedgwick of Massachusetts, gave notice, in the House of Representatives, that he would soon move a resolution for amending the Constitution, so as to protect the states from being sued in federal courts. On the 20th, the resolution, in the form of an amendment, was offered in the Senate,[1] but it slumbered for a year, till, on the 2d of January, 1794, it was again brought up, was discussed briefly, and was passed, on the 14th, by a vote of twenty-three to two. On that day it was read in the House for the first time, but it was the 4th of March[2] before it finally passed.[3] Three years elapsed before the requisite number of states adopted it. Its ratification was announced by President Adams on the 8th of January, 1798.[4] There was strictly no precedent for the amendment in any which had been demanded by the ratifying conventions or in any of the state constitutions. The nearest approach to a precedent was one of the amendments, demanded by Virginia and North Carolina, relating to the jurisdiction of the United States courts in cases arising after, but not before, the ratification of the Constitution.[5]

Though there was no immediate precedent for the amendment, its spirit and purpose may be found in the

[1] Annals, 1793, p. 651. [2] Id. p. 477.

[3] By a vote of 81 to 9. The language of the amendment was suggested by Albert Gallatin.

[4] Richardson, vol. i, p. 260, and see Adams's special direction to Pinckney, in Works, vol. viii, p. 552.

[5] In Virginia, Elliot, vol. iii, p. 661; in North Carolina, "Documentary History of the Constitution," vol. ii, p. 272.

ideas of state sovereignty prevailing in the eighteenth century. In the act of the assembly of Connecticut of October 10, 1776, which was the response of that colony to the suggestion of Congress to take up civil government, the state was described as free, sovereign, and independent. The Constitution of Massachusetts of 1780 made a similar declaration, as did that of New Hampshire of 1784. The treaty of peace with England of the preceding year [1] mentioned the thirteen states each as being free, sovereign, and independent, and this conception was a part of the unwritten constitution of states outside of New England. No southern state used the word "sovereign" in its constitution, but the opinions of southern statesmen and of southern people respecting state sovereignty were unwritten law. The government of the United States was popularly believed to be a confederation of sovereign states,[2] though a few members of the federal convention, like King and Hamilton, clearly pointed out that the states were not sovereign in the sense in which the general government was sovereign.[3] The result of such diverse opinions was a compromise: that the states possessed residuary sovereignty,[4] and with this understanding the Constitution was ratified. The Anti-Federalists held to a man that the sole purpose of forming the general government had been to preserve the sovereignty of the states.[5] When, therefore, in 1793, the supreme court ruled that the states were not sovereign, but could be brought before a federal court like an individual, the country took alarm and the eleventh amendment was the direct consequence.

No part of the national plan of government was more difficult to settle than that on the executive, and the article on the subject was almost the last to be completed. The members greatly differed as to whether the executive should be single or plural; for life or for a term of years; and especially did they differ as to the manner of choosing him. Finally, they forsook all state precedents and adopted a method of choosing, which was novel and

[1] September 3, 1783, Article I; Treaties and Conventions, p. 376.
[2] Elliot, vol. v, p. 176.
[3] Id. vol. v, pp. 201, 212.
[4] "The Federalist," No. LXXII.
[5] Elliot, vol. v, p. 249.

experimental. Though bearing some analogy to the method of choosing state senators in Maryland, it will be found, upon examination, that that method and the one finally adopted by the convention have little in common. The difficulty consisted in choosing a national officer by federal methods. If the new government was wholly federal, the method of the election of the President by state legislatures was not the proper procedure; if it was wholly national, he should be elected by popular vote, but as the government was partly federal and partly national, the method must be a compromise. The method finally adopted gave general satisfaction and was almost the only part of the system which escaped censure.[1] But the method did not distinguish between candidates for the presidency and the vice-presidency, and, in consequence, the results of an election might be uncertain. The obvious defect was the omission from the plan of a requirement to designate by the electoral votes the candidate for President and the candidate for Vice-president. But this end, which seemed to have escaped the attention of the convention, was finally reached by events quite accidental.

The framers of the Constitution gave no sign that they expected the administration of the government to fall into the hands of parties or the choice of officials to become a party matter. The Vice-president was considered a superfluous officer, especially by the Anti-Federalists. The framers evidently had great confidence in the virtue of that body of men whom we call the electoral college. They considered them for a time to be the agents of the states, chosen by the people to name a president. Wilson advocated his election by popular vote, but the proposition was not considered. Distrust of popular government led the framers to put the choosing of the President and Vice-president into the hands of a special body of men. In case two persons received each a majority, and the same number of votes, the highest vote, by states, should elect the President; and if there then remained two candidates with equal votes, the Senate should choose the Vice-president. The evident

[1] "The Federalist," No. LXVIII.

purpose here was to secure the choice of these two officers by a federal act. As long as Washington lived and would accept the office of President, there was little doubt who its incumbent would be. But the distribution of the electoral vote, in 1789 among twelve persons, in 1792 among five, and in 1796 among thirteen, intimated from the beginning that unless public opinion was explicit and some person was the unmistakable choice for President, the vote was likely to be scattered, and that elections by the House might prove the rule instead of the exception.

The framers could not well have anticipated this condition of things. The debates in the federal convention indicate that the framers believed that the college could always find one man of dominating popularity, and another for second place sufficiently well known to satisfy the majority of the electors. Time did not realize this expectation. The men who received electoral votes were the favorite sons of states, and so strong was the idea of state sovereignty that it was almost impossible that any successor to Washington should at all approach him in national reputation. There was the probability of a disputed election in 1796, when it was doubtful whether Adams, Jefferson, or Thomas Pinckney would be chosen. It was soon known that Adams had seventy-one votes, Jefferson sixty-eight, and Pinckney fifty-nine. The result, therefore, was a Federalist for President and a Democratic-Republican for Vice-president.

The incongruity of a divided political responsibility does not seem to have occurred to many at the time, but just two months from the day of election[1] William Smith, of South Carolina, offered a resolution in the House that the Constitution be amended so as to prevent the inconvenience that might arise from the prevailing mode of choosing the President and Vice-president, and so to carry into effect the general intention of the electors. The motion was made a month before the electoral vote was counted, and received no further attention than to be ordered printed. Not one state gave its full vote for Adams and Jefferson, and the four that cast electoral votes for them also supported six other candidates.

[1] January 8, 1797, Annals, p. 1824.

Adams received the entire electoral vote of eight states; Jefferson of four; Pinckney of five; Burr and Ellsworth each of two, and Clinton of one. Considering the strength of the doctrine of state sovereignty at the time, it is not surprising that there was dissatisfaction with a system which gave the country a President who was the first choice of only one half of the states, and a Vice-president who was the choice of only one-fourth of them, and yet between which two candidates there was a difference of only three votes.

The result of the election, in 1796, displeased the Federalists, for they had planned to elect Adams and Thomas Pinckney. The federalist region lay north and east of Pennsylvania but included Delaware. Political sentiment in the remaining portion of the country was strongest for Jefferson and Burr. Though there were no formal platforms or nominations, there was a more or less common understanding that Adams and Jefferson represented two widely different political schools. The election of both, therefore, raised many apprehensions.

That a month before the counting of the electoral vote, a resolution should be offered in Congress to amend the Constitution, so that electors should designate their choice for President and Vice-president, must be accepted as evidence that the public mind was not at rest on the subject. The resolution was, however, soon forgotten; three years passed, and Adams's stormy administration was drawing to a close, when Abiel Foster, a representative from New Hampshire, renewed the electoral amendment on the 16th of February, 1799. Two weeks later, by a vote of two to one, the House refused to refer the resolution to a committee of the whole.[1] On the 23d of January, 1800,[2] James Ross, of Pennsylvania, moved in the Senate the appointment of a special committee to report a bill for deciding disputed elections for President and Vice-president. The bill passed the Senate on the 28th of March, was amended both in the House and the Senate, but was at last rejected by the House by a vote of seventy-three to fifteen.

While the Ross resolution was under consideration, the

[1] Annals, 1799, p. 2919. [2] Annals, p. 29.

question of a constitutional amendment to regulate the election of President and Vice-president came before the House on the 4th of February. Its purpose was to require that the electoral vote be designated, but it was buried in committee of the whole. John Nicholas, of Virginia, on the 14th of March proposed as an amendment the division of each state into a number of districts corresponding to its number of electors, but his resolution was sent back adversely in an elaborate report that no change in the method prescribed by the Constitution was expedient.[1]

Meanwhile the presidential election of 1800 had occurred; its results were known and the first disputed election had arisen. This condition of affairs had been brought about largely by the party intrigues of Hamilton, and other leading Federalists, to make Charles C. Pinckney President and to bring Adams to the second place.[2] The formal ballot of electors, on the 11th of February, gave seventy-three votes to Jefferson; seventy-three to Burr; sixty-five to Adams, sixty-four to Pinckney, and one to John Jay. The election of a President, therefore, devolved on the House. On the 18th, at one o'clock, the thirty-sixth ballot was taken; ten states had voted for Thomas Jefferson, four for Burr, and two had cast blank ballots.[3] The House had made Jefferson President, and Burr, having received the next greatest number of votes in the college, was Vice-president. Thus events speedily disclosed that the danger which had been discussed three years before was both real and serious. At the election in 1800 sixteen states voted, in eight of which the electors were chosen by the legislatures, and in eight by the voters; but the mere method of choosing presidential electors had little bearing on the final result. In Connecticut the electors, appointed by the legislature, had voted for Pinckney; the South Carolina electors, appointed in like manner, had voted for Jefferson and Burr. The New Hampshire electors, chosen by popular vote, had cast their ballots for Adams and Pinckney, but the electors

[1] Annals, pp. 941–946.
[2] "Life and Works of John Adams," vol. i, pp. 576–597.
[3] Annals, pp. 1031–1033.

of Kentucky and Tennessee, chosen in the same manner, had voted for Jefferson and Burr. Thus the Union on party lines was divided into eight republican and six federalist states. The remaining states were partly federalist and partly republican. Though there were no platforms or nominating conventions, Adams and Pinckney were the recognized federalist candidates, and Jefferson and Burr the democratic-republican. Testing the election in the House by the electoral vote of the states, the choice of Jefferson and Burr more fairly expressed the will of the country than did that of Adams and Jefferson in 1796.

However, the fact most distressing to the Federalists remained, — that they had failed to bring in either of their candidates. The rumor spread that the election in the House had been brought about by collusion, and mingled with this tale, which many of the Federalists took no pains to correct, were the mutterings of the friends of Burr, who had confidently expected the first place for him. Thus, suddenly the constitutional method of choosing the chief magistrate was confused with the animosities, the schemes, and the disappointments of party politics. The question thus ceased to be abstract, but became one of practical politics. The Constitution had proved defective in an essential part. Jefferson had been comforted, in the prospect of his missing the presidency, that though "the federal government would have been in the situation of a clock or watch run down, there was no idea of force nor of any occasion for it. A convention, invited by the republican members of Congress with the virtual President and Vice-president, would have been on the ground in eight weeks; would have repaired the Constitution, and wound it up again."[1] As the Senate consisted of nineteen Democratic-Republicans and thirteen Federalists, and the House of seventy-one Republicans and thirty-four Federalists, and as Jefferson was Vice-president, the Republican members on the ground were a factor to be reckoned with.

[1] Jefferson to Priestley, March 21, 1801; Works (Ford's Edition), vol. viii, p. 322.

An amendment of some kind, regulating the election of the President and the Vice-president, now seemed imminent, but another year passed before further effort toward one was made. On the 12th of April, 1802, DeWitt Clinton in the Senate proposed as an amendment that the persons voted for as President and Vice-president be particularly designated,[1] but the matter was again postponed. Meanwhile the House was entertaining amendments, and one of them providing for the designation of candidates was carried, on the 2d of May, by a vote of forty-seven to fourteen; but the Senate refused to concur.[2] Further procedure was prevented by the adjournment of Congress. The defeated measure was brought up again on the 3d of January by Michael Leib, of Pennsylvania. Bayard, of Delaware, called for a committee on the subject on the 8th of February; and Griswold, of Connecticut, recommended the provision on the 9th; but the House, without a decision on the matter, discharged the committee and the subject was dropped for the remainder of the session.

The steady recurrence of the proposition to amend was a sign of the times. When, on the 17th of October, 1803, the eighth Congress assembled, nearly six years had passed since the first amendment to designate the candidates had been proposed. On the first day of the new session, Dawson, of Virginia, renewed the motion which Smith had made in 1797, and on the next day, in committee of the whole, the House set itself seriously to its consideration.[3] The amendment merely directed the designation of the electoral votes, but Nicholson, of Maryland, detecting the imperfection, proposed that Dawson's amendment be changed so that the person receiving the highest number of votes for Vice-president should thereby be elected, unless the vote for two or more was equal, in which case the Senate should choose. Clopton, of Virginia, wished the choice, when made by the House, limited to two instead of to five candidates, as the Constitution provided. The matter was then

[1] Annals, p. 259. [2] Id. p. 304.
[3] Annals, Eighth Congress, First Session, 372.

referred to a committee of seventeen, along with another amendment for districting the country for presidential electors. In the course of the debate a point of order arose, and the Speaker, Nathaniel Macon, of North Carolina, ruled that a simple majority is competent in Congress to decide all matters preliminary to the final adoption of constitutional amendments.[1]

On the 22d, Dawson proposed that in cases when the election went to the House, the choice should be from the three highest on the list, but when the Vice-president was chosen by the Senate, the choice should be from the two highest. The select committee accepted this, but the limitation to the House of three candidates instead of five, at once raised the question of the limitation of the rights of the small states. The debate soon showed that there was little objection to an amendment of some kind, but that there was great objection to changing the number of candidates from five to three. The friends of the larger number carried the day by a vote of fifty-nine to forty-seven; the amendment was ordered engrossed and passed to a third reading. The debate is of interest because of its elucidation of political beliefs prevailing at a time when the Constitution was in the infancy of its administration. Most of its framers were still living and were in public life, but the men who were now discussing the proposed twelfth amendment in Congress belonged to a new generation. The current of party passion ran high. Many a devout Federalist believed that the clock of government had run down the moment when the House of Representatives chose Jefferson President.

The assertion, during the debate, that the proposed amendment would imperil state sovereignty, if the number of possible candidates was changed from five to three, seems somewhat curious to us now. The advocates of state sovereignty agreed with Hugher, of South Carolina, that the Constitution was a compact and a compromise of interests, and that the federated government agreed upon in 1789 was a compact between thirteen separate sovereignties. The inhabitants of the United States in

[1] Annals, Eighth Congress, First Session, p. 381.

framing the Constitution, said Hugher, did not act *en masse* as one people.[1] The balance between great and small states was the issue when the Constitution had been ratified, and any variation from that balance would endanger the states. Hastings, of Massachusetts, reminded the House that if the Constitution was to be amended, the first thing to receive attention was the article authorizing the rendition of fugitive slaves, which operated with peculiar inequality in the northern and eastern states; to which Matthew Lyon, lately representing a New England constituency, but now a member from Kentucky, replied that the sacrifice of which some complained had been made by the people among whom slavery was permitted.[2] The resolution was then adopted.[3]

While it was before the House the Senate had been discussing a similar amendment, proposed by Clinton on the 21st of October.[4] Many modifications were suggested, and the whole subject was referred to a select committee of five, which reported on the 24th of October. Dayton, of New Jersey, wished to abolish the vice-presidency. The debate dragged along until the 23d of November, when the Senate, having decided that two-thirds of the members present could pass an amendment, proceeded seriously to consider the committee's report.

And first, it rejected both five and two as the number from which the House might choose and agreed on three. John Quincy Adams, in a vigorous speech, urged that as the House had already accepted the number five, the Senate ought to retain that number. Butler, of South Carolina, declared that the change which the Senate would make would violate the compact of the Union, and that if its amendment was not adopted the Federalists would elect the next Vice-president. This, he said, was the pivot upon which the whole matter turned. Finally the committee's report was adopted by a vote of twenty to eleven.

The debate which followed was like that which had been heard in the House. Hillhouse, a senator from Connecticut, asserted that if the amendment passed, the

[1] Annals, p. 522.
[2] Id. p. 554.
[3] 38 to 31.
[4] 1803, Annals, p. 16.

election would go to the House nine times out of ten, and that instead of a comedy, as in the election in 1804, there would be a tragedy in the election of 1808. So vigorous was the objection to the number three, it was struck out and the number was left blank. This precipitated a debate whether the change from five to a lesser number would tend to diminish the rights of the smaller states. On the 25th it was agreed, without debate, that the vote in the House should be by states, following the language of the original clause, and that the choice of the Senate should be restricted to the two highest members on the list. Some of the federalist senators now made earnest arguments against changing the Constitution at all, but they were in the minority. By a vote of more than two to one it was agreed that the number of candidates before the House should be three, but this did not determine how the House should proceed in case more than three candidates have the same number of votes. So many amendments were now offered on the subject, all were ordered printed, that the Senate might discover how the matter stood, which led Smith, of Maryland, to ask, "Why not throw dice for the office of President, the highest number to win?" Finally, it was decided to insert the number three instead of five, and to omit the clause limiting the period for which a President could be elected. The Vice-president, Burr, declared that the resolution had passed by a two-thirds vote, and it was sent to the House with a request for concurrence.[1]

Two resolutions had now been passed: one by the House, sent to the Senate on the 28th of October; another by the Senate, sent to the House on the 1st of December. The essential difference between them was the number from which the choice should be made. The House retained five, the original number of the Constitution; the Senate inserted three, and the provision that in case no President was chosen by the House before the 4th of March, the Vice-president-elect should become President.

The Senate resolution was taken up in the House on the 6th of December,[2] but the Senate had paid no attention to

[1] Annals, p. 210. [2] Id. p. 646.

the House resolution. Objection was made in the House to the Senate amendment, — that it had not been passed by the constitutional number of senators, for everybody knew that only twenty-two of the thirty-four members of the Senate had voted for it, but it was finally decided that as by the Constitution each House keeps a journal and determines its own rules and regulations, therefore the House has no authority to judge the Senate; therefore the resolution had come before it in a proper form. In this conclusion the House agreed by a vote of thirty-five to eighty-four and thus settled an important question in congressional procedure.[1]

There was a strong effort made to abolish the office of Vice-president as superfluous. At last, after repeated refusals to adjourn, or to let the committee of the whole rise, the House agreed to the Senate resolution, but refused, by a vote of eighty-two to thirty-five, to substitute the number three for five in the report.[2] The Senate amendment was then divided and the first part, containing the provision for designating the electoral vote, passed by a vote of eighty-five to thirty. The other clauses were then agreed to and the Speaker, Macon, arose to put the whole resolution. The Federalists attempted to delay the vote until the next day. Randolph moved for an immediate decision and the House sustained him, though not by a strictly party vote.

On the 8th, the debate was resumed. Lowndes, Randolph, and a few other believers in state sovereignty took occasion carefully to outline its doctrines. Throughout the discussion little was said of national sovereignty, for as yet little was thought or known. Campbell, of Tennessee, observed that the government was formed by the people of the United States in their national capacity and not by the several states convened in their state capacities, in proof of which he cited the opening words of the preamble, "We the people of the United States," [3] but he was speedily corrected by many members, who informed him that the Constitution was adopted by the states acting in their corporate capacity, and that the

[1] Annals, p. 663. [2] Id. p. 683.
[3] Id. pp. 718–727.

proposed amendment could not be adopted "without in fact destroying the very basis of the Confederacy." At last the debate came to an end, after state rights, state sovereignty, the Constitution a compact between the states, intrigue and corruption in elections, the relative merits of three and five candidates, the use and the uselessness of the office of Vice-president, the popular will and the danger of innovation had all been touched on. Then the vote was taken. Forty-two stood for the resolution and forty-two against it. The casting vote of the Speaker, Nathaniel Macon, carried the amendment.[1]

On the following day, the 12th of December,[2] the Senate concurred and the joint resolution was sent forth to the states for ratification. It made rapid progress through the legislatures, for the public mind had long been made up. On the 25th of September, 1804, Madison, then Secretary of State, formally proclaimed that it had become a part of the Constitution.[3] Its adoption may be said to have completed the Constitution as a piece of eighteenth century work.

When the first ten amendments passed Congress, all the framers of the Constitution, save one, were living; eleven were members of the Senate, and eight of the House. One was President of the United States, — Washington, — and his signature was affixed to the twelve amendments which went out to the states on the 25th of September, 1789, and of which ten were ratified. The eleventh was adopted by Congress on the 5th of March, 1794. During its discussion nine of the framers were members of the Senate, and five of the House. During the six years that the twelfth amendment, in one form or another, was under consideration in Congress, seven of the framers were members of the Senate, and four of the House. At the time of its adoption by the eighth Congress, Dayton, Butler, and Baldwin were in the Senate; none of the framers then belonged to the House though thirty-four were still living. The six framers of the Constitution who were members of the House and

[1] Annals, p. 776. [2] 1803; Annals, p. 214.

[3] For the acts of ratification, see "Documentary History of the Constitution," vol. ii, pp. 411, 451.

voted on the first ten amendments, supported them. The eleventh was supported, in the Senate, by Ellsworth, Butler, King, Langdon, Martin, and Strong, and in the House by Baldwin, Gilman, and Madison. Fitzsimons voted against it. In 1803, when the twelfth amendment was proposed, Baldwin voted for it in the Senate, and Butler against it. Thus the record shows that of the twenty framers of the Constitution who were members of Congress during the period when the first twelve amendments were under discussion, only two voted against them. The attitude of John Quincy Adams toward the twelfth amendment as it passed the Senate, and his vote against it, because it limited the House to a choice of three instead of five candidates, is of interest in the light of his later history. The second disputed election occurred in 1824, when the electoral votes for President were divided among Jackson, Adams, Crawford, and Clay. By the twelfth amendment, the House could not vote for Clay, the fourth on the list. Had Adams's wishes, as he proclaimed them in 1803, prevailed, and the number remained five, as in the original Constitution and as the House amendment provided, undoubtedly Clay would have been chosen President.

Made so soon after the original instrument, these twelve amendments have long seemed contemporary with it.[1] Turning to their source, it is clear that the first ten, as Jefferson declared they ought to be, are a declaration of rights and may be said to have emanated from a common source, the state constitutions. Some of them, as we have seen, lead back to the *Magna Charta*, others to the petition of rights, and one was taken without change from the famous bill of rights enacted in the time of William and Mary. At least eight are traceable to the Declaration of Independence and three to the older declaration of 1765, but the immediate source of most of them was the state constitutions and the amendments demanded by the ratifying conventions. The eleventh and twelfth amendments were administrative in character and could not have the same source as the first ten.

[1] Corfield *v.* Coryell, 4 Wash. C. C. 371.

They were devices, opportunist measures, originating in the necessity of the times. Posterity has not accepted Gouverneur Morris's opinion of the first twelve amendments, — that they are "generally speaking, mere verbiage."[1] They have formed a part of the supreme law so long, they seem to be as much the work of Franklin, Washington, Wilson, and Madison, and their colleagues in the federal convention, as the original instrument itself.

The most notable aspect of the effort to secure the amendment of the Constitution, is the conscious attempt of political parties to incorporate in the Constitution provisions which would make reasonably certain a peaceful administration of the government. The brief period from 1789 to 1805 was of critical importance in the evolution of popular government in America, because it was the era when debate of the theory of republican institutions was giving way, in a preliminary fashion, to examination of the problems of administration. These problems involved the test which every government, whatever the form, must stand: the test of practical operation.

Yet, it must be noted, that the twelfth amendment, regulating the election of President and Vice-president, is of a different order than any of the preceding eleven. It was an administrative amendment; they were additions and corrections to bring the national plan into conformity with accepted principles. It can scarcely be said that the twelfth amendment involves a principle.

It is the first fruit of the awakening to the responsibilities of administration of government, and slight as many considered its value at the time of its enactment, it attempted to solve one problem in administration which public opinion in our own day considers as yet not fully solved: the best method of electing the chief executive. In the evolution of popular government in America, this amendment gives date to the close of an era: the era of theories of government. The American people, as a nation, have never abandoned the principles laid down by the Fathers, and first embodied in the organic laws of the country in the eighteenth century.

[1] Diary and Letters, vol. ii, p. 529.

In our day, when a new President turns from the delivery of his inaugural to take up the duties of his great office, he finds himself at the head of a thoroughly organized government. His predecessor has summoned the Senate in extra session to act on appointments; several thousand clerks, distributed among eight executive departments, are attending to the routine of the public business all over the land. National courts are adjudicating a multitude of cases in the light of a long line of precedents. The accession of a new President causes no jar or entanglement of public affairs. Whatever his politics he assumes his duties with the aid of a vast body of experienced subordinates. Whatever his policy, he does not begin a government. Far different was the condition of affairs in 1789. A President and a Vice-president, senators and representatives had been elected, but there was no federal organization excepting the imperfect and feeble one of the Confederation. There was a department of foreign affairs; a treasury department; a war department; a postoffice department and a navy department, but under no such organization as their successors soon enjoyed. The organization of the new government straightway became a political issue, — or, more correctly speaking, a succession of issues. The settlement of these issues resulted gradually in the organization of a national government. Let us now see how this was effected.

CHAPTER VII

CONTEST

About the time when the first ten amendments were ratified in 1789, an important question in the administration of the government arose: that of the constitutionality of a national bank. Washington turned to his chief advisers for counsel, but their opinions were irreconcilable. Jefferson held to the letter of the Constitution.[1] He acknowledged that it empowered Congress to borrow money and to lay taxes, to equip fleets and armies, and to promote the general welfare, but it said not one word about a bank. To take a single step beyond its plain boundaries would be dangerous. True, Congress could lay taxes for the purpose of providing for the general welfare, but it could not lay them for any purpose it pleased, as it was restricted to paying the debts and providing for the welfare of the Union. It was not intended to make Congress the sole judge of good or evil, but rather to lace up Congress straightly within its enumerated powers. The provision to make all laws necessary and proper for carrying into execution its enumerated powers could be administered, he said, without a bank. Evidently such a corporation was unnecessary, and therefore was not authorized by the Constitution. Granting that a bank would facilitate the collection of taxes, yet the Constitution permitted only necessary and not merely convenient means for executing the authority of Congress. A loose construction here would prove in the end most perilous, for the Constitution would be tortured into an interpretation which would swallow up necessity in mere convenience.

[1] Works, vol. vii, p. 555.

Far different was Hamilton's advice. The Constitution, he said, plainly empowered Congress to do what was necessary and proper. Its powers were implied as well as expressed,[1] and the objects entrusted to its management were in their nature sovereign. Inseparable from sovereignty was the right to erect corporations. The word "necessary" was not to be construed restrictively, nor as a supreme test of a constitutional right. Necessity meant expediency. To incorporate a bank would not stretch the power of the government, because it would be only the exercise of authority within the sphere of specified powers. Moreover, the right of Congress to erect corporations had already been exercised in the organization of two territorial governments, the one northwest and the other southwest of the Ohio.[2] Thus, in brief, Hamilton advised Washington that Congress had power to charter a national bank, because of the sovereignty of the federal government. His opinion prevailed, and the bill, which had passed Congress on the 8th of February, 1791, was signed by the President.[3]

The principle involved in the creation of a national bank by Congress was laid down in "The Federalist" in the general proposition that a government must possess powers adequate to the ends which it seeks to attain, and that the exercise of these powers is a matter of expediency. In brief, the question of establishing the bank was administrative as well as organic. Public finance might be regulated, the balance sheet of trade might be struck, by some other agent than a bank, organized as was the bank of 1791. But in weighing the arguments for and those against the bank bill, Washington could find principle and expediency in the one scale and neither in the other.

The institution thus authorized had a capital of ten million dollars, one-fifth of which was subscribed by the United States. Its charter ran for twenty years and its bills were a legal tender in all payments to the United

[1] Works, vol. iv, pp. 105, 119.
[2] Northwest, August 7, 1789; Statutes at Large, vol. i, p. 50. Southwest, May 26, 1790, Id. p. 123.
[3] February 25, 1791, Id. p. 191.

States. Branch banks were established in the principal cities, and the entire career of the parent bank was prosperous and highly beneficial to the country. Twenty-eight years after the passage of the bill creating it, the supreme court declared that Congress had power to incorporate a bank;[1] and five years later the court held that the United States could protect the bank against a state.[2] Not only did Hamilton's opinion prevail with Washington, but ultimately with Jefferson himself, who, when he became President, signed the act[3] which had passed Congress without a division to allow the bank to establish branches in the territories.

The creation of the bank in 1791 gave rise to the formulation of two conflicting interpretations of the Constitution, familiarly known as the strict and the loose; the one of adhesion to the exercise of expressed powers, the other to that of implied also. This difference of interpretation may be traced throughout the political and constitutional history of the country since the organization of government under the Constitution. Primarily dividing over the powers of Congress, political parties have, as time passed, differed in like manner concerning the powers of the President and of the federal courts. The seam of this division in public opinion is visible throughout American political institutions. No party has continuously and persistently adhered to either a strict or a loose construction of the Constitution. The Federalists, loose or broad constructionists, in 1791, over the establishment of a national bank, suddenly became strict constructionists in 1803, over the acquisition of the Louisiana country, their political opponents changing their attitude in like manner. But as strict constructionists or loose constructionists the classification of parties has long been made: this line of division perhaps being most easily traced. Generally speaking, the democratic party has insisted upon a strict construction of the powers of

[1] McCullough *v.* Maryland (1819), 4 Wheaton, 316; Story's Commentaries, 1262. The decision was by Chief-Justice Marshall.

[2] Osborn *et al. v.* Bank of the Northwest (1824), 9 Wheaton, 738; Marshall, 324; see also page 241 of the present work. Decision by Marshall.

[3] March 23, 1804; Statutes at Large, vol. ii, p. 274.

the federal government, — legislative, executive, and judicial; and the adhesion to the principle has been one of its cardinal doctrines since the days of Jefferson. The Federalists, the National Republicans, the Whigs, and the Republicans, originating as a party in the days of Hamilton, have favored a broad construction of federal powers, the exceptional cases only establishing the rule. But the dictum of Hamilton that "necessity is expediency" must ever be kept in mind when the attempt is made to generalize on the history of political parties in America.

Four years after the incorporation of the bank, a question of vital importance was raised by the Jay treaty.[1] Washington had sent Chief-Justice Jay as a special envoy to settle all questions of dispute between England and the United States. These were chiefly compensation for negroes taken by British troops during the revolution; the settlement of the boundary and the removal of British troops from the Northwest; the payment of claims for property illegally seized by British authority; and the right of the people of the United States to trade, undisturbed by England, with neutral powers. The treaty was signed on the 19th of November, 1794. On the 24th of June of the following year it was ratified by the Senate, but meanwhile hostility to the treaty had taken form outside of Congress in the protests of public meetings and state legislatures against its approval by the President. Washington approved it. The House delayed voting the necessary appropriation for carrying it into effect. During the debates in the House, which were almost continuous from January till May, 1796, the treaty, which had been both ratified and amended by the Senate, arrived, after having been approved by the British government. The House was not satisfied, and called for all papers on the treaty in the possession of the President, but he refused to deliver them on the ground of expediency and the lack of authority of the House to call for them.[2] The House then took the position that, as the execution of the treaty would depend upon appropria-

[1] Treaties and Conventions, pp. 379, 395.
[2] Sparks' Washington, vol. xiii, p. 112.

tions, and as these were within its control, therefore it had the right to pass judgment on the expediency of the treaty.[1] It also resolved that, if acting within its authority, it was not bound to declare the purpose for which it sought information from the President. The great question was not so much the right of the House to demand the papers as its constitutional right to refuse the appropriations for executing the treaty.

The Democratic-Republicans, led by Madison, insisted on the constitutional right of the House to refuse them, and it was even argued that the House ought to participate in the treaty-making power. But even the strictest of strict constructionists could find no word in the Constitution which empowered the House to participate in the making of treaties; therefore the Republicans were compelled to base their argument on the ground of expediency and on the exclusive authority of the House to originate money bills and to regulate trade. The Republicans asserted that the Constitution clearly gave Congress power to lay and collect taxes and to regulate commerce with foreign nations, but as by the Constitution a treaty was a part of the supreme law of the land, it might follow that the Senate and the President, who possessed the treaty-making power, might make laws regulating commerce and exclude the House from all participation. Indeed, treaties and the laws of Congress might conflict. The Federalists argued from the plain intent of the Constitution. Fisher Ames spoke so eloquently [2] in favor of voting the appropriation to execute the treaty, and his speech was so unanswerable, that the Republicans adjourned the House lest a vote should be taken. On the following day, the 30th of April, the House voted, though only by a majority of three, to carry the treaty into effect, and thus solved the question of appropriations.

At the next session of Congress [3] the Senate was federalist, the House democratic-republican.[4] Jay's treaty

[1] Resolutions of April 7, 1796.
[2] April 28, 1796; Johnston's American Orations, vol. i, p. 64.
[3] The fifth Congress, May 15, 1797, March 3, 1799.
[4] Senate, 21 Federalists, 11 Democrats; House, 51 Federalists, 45 Democrats.

had offended France, and her aggressions upon our commerce promised war. The Republicans at home were in sympathy with France, until the publication[1] of the insults heaped on Pinckney, Gerry, and Marshall, whom Adams had sent as special commissioners to France, turned the tide and so affected the elections as to give the Federalists control of both Houses. Eager to prevent a repetition of the late experience of the country at the hands of noisy foreigners residing within it, who had used libelous language and had engaged in unlawful enterprises on behalf of the French Republicans, the Federalists determined to increase the army and navy, to prevent the treason of citizens, and to silence the calumny of aliens. With a majority in both branches they easily carried out their program. The naturalization laws were amended so that a foreigner was required to reside fourteen years, instead of five, in the country; and to give five, instead of three, years' notice of his intention to become a citizen.[2] An alien enemy could not be naturalized. All resident aliens were to be registered and thus brought within the surveillance of the government. The President was empowered to expel from the country all aliens whom he adjudged dangerous to its peace and safety, or whom he suspected engaged in treasonable practices.[3] In case of war with a foreign country, the President, at his discretion, might cause all resident aliens or citizens of that country to be arrested, and, if necessary, removed. The second of these laws was known as the alien act, and provoked widespread hostility.[4]

The Republicans held[5] that it violated the right of personal liberty, and therefore infringed upon the state constitutions; that it interfered with the right of free migration, and therefore was a direct injury to the states; and finally, that it was unconstitutional because it con-

[1] The X Y Z despatches, October and November, 1797.

[2] Act of June 19, 1798; Statutes at Large, vol. i, p. 566; Annals of Congress, p. 1570.

[3] Acts of June 25, and July 6, 1798; Statutes at Large, vol. i, pp. 570, 577; Annals of Congress, p. 1566.

[4] For the alien act, June 25, the alien enemies act, July 6, and the sedition act, July 14, 1798, see Macdonald, pp. 141–146.

[5] Madison's Works, vol. iv, p. 524; Annals of Congress, pp. 1631, 1773.

fused executive with judicial functions. They held essentially the same opinions respecting the other two acts. By what constitutional right, they asked, could the President at his discretion declare a resident alien to be a public enemy? Or where was the constitutional authority for a law empowering the President to arrest a person, even an alien, who he might claim was engaged in treasonable undertakings? Clearly the law violated the rights of freedom of speech and the press which were given to every inhabitant of the country by the state constitutions. It also violated the right of *habeas corpus*, a right which every man had under the laws and constitutions of the commonwealths.

In the face of all these formidable objections, the Federalists persisted in passing the acts. Before they were on the statute books legislatures and political parties began a campaign against them. The master spirit in this counter-revolution was Jefferson. He saw clearly that the Federalists were intent upon building up a strong executive department,[1] — too strong, he believed, for the other parts of the Constitution. He and his followers, on the other hand, were equally ardent to strengthen the legislative.

Political parties had not yet been thoroughly organized, but from the time of the enactment of the alien and sedition laws are quite clearly defined. The two parties were the national party, or Federalists, and the state party, or Democrats. The Federalists would strengthen the general government, as the Democrats believed, at the expense of the states. The Democrats would strengthen the state governments, as the Federalists believed, at the expense of the United States. The decision of the supreme court in the case of Georgia had alarmed the state party, and it had taken up Iredell's dissenting opinion as the true and just interpretation of the Constitution. The eleventh amendment, ratified five years, lacking three weeks, after Wilson's decision, was a pronounced victory for the democratic party. While the

[1] "The Constitutional History of the American People, 1776–1850," vol. i, pp. 169, 189.

Federalists were carrying their odious alien and sedition acts through Congress, Jefferson and his friends sounded the alarm, and began the campaign which was to overthrow them. The state party took the ground that the acts were clearly unconstitutional. Pamphlets and newspaper articles pronouncing them so, multiplied in all quarters. Public meetings were called, especially in the South and West, and resolutions drawn up with great care were sent up to the legislatures. John Breckenridge presented a set of resolutions to the Kentucky legislature on the 7th of November, 1797. Jefferson was their author.[1] After a week's debate, which was, in truth, a series of eulogies of the doctrine of the state party and an attack on the Federalists, the Kentucky resolutions passed.

A similar set, written by Madison at Jefferson's request, was presented in the Virginia legislature on the 13th of December, and was adopted on the 24th.[2] These were the famous Virginia and Kentucky resolutions. A second set, also written by Jefferson, was adopted by the Kentucky legislature on the 22d of November, 1799.[3] Though differing in phraseology, and somewhat in their teachings, the three sets of resolutions constituted a body of political doctrines of the gravest character. The three sets agreed in declaring that the Constitution was a compact to which the states were a party, and that the powers of the general government were limited by the plain sense of the Constitution. In case of a deliberate, palpable, and dangerous exercise of powers that had not been granted, the states were in duty bound to interpose and arrest the progress of the evil. The federal government was accused of seeking to enlarge its powers by a forced construction of the Constitution for the purpose of consolidating the states into one sovereignty, the effect of which would be the transformation of the republic into a monarchy. The Virginia and the first Kentucky resolutions went no further, but the second Kentucky set declared

[1] For the resolutions, see Preston's Documents, p. 287; Elliot, vol. iv, p. 540.
[2] Preston, p. 284; Elliot, vol. iv, p. 528.
[3] Preston, p. 295; Elliot, vol. iv, p. 544.

the alien and sedition acts unconstitutional, because they violated the bills of rights, the very foundation of the state constitutions. And because the states which had formed the Constitution were sovereign and independent, they had the unquestionable right to judge of its infraction. The rightful remedy, therefore, was "a nullification by those sovereignties of all unauthorized acts done under color of that instrument." In brief, the resolutions claimed that the commonwealths were sovereign powers and denied sovereignty to the general government. Carried to their ultimate conclusion, the second Kentucky resolutions plainly asserted the right of a state to nullify a federal law. From this doctrine the right of secession was an inevitable deduction.

The fateful idea of state sovereignty had now been clearly set forth and its practicable form suggested. Copies of the resolutions were sent to all the legislatures, and seven states made formal replies.[1] Some of them defended the alien and sedition laws; Delaware declared that the Virginia resolutions were an unjustifiable interference with the powers of the general government; Vermont and Massachusetts asserted that no state legislature had the right to usurp the powers of a federal court. Not one state, save Virginia and Kentucky, had approved the resolutions. Jefferson and his friends did not expect such a repulse. The replies of the states were referred by the Virginia house of burgesses to a committee of which Madison was chairman, and he, taking up the original resolutions article by article, labored in an elaborate report [2] to prove that they were in harmony with the express provisions of the federal Constitution. Madison did not hold to the doctrine of nullification, but he pronounced the federal government a compact between the states, and declared that its powers were not original, but derivative. He cited the history of the country to prove the inaccuracy of the idea of national sovereignty. The states were the final arbitrators. They were the creators of the general government; it was their agent. Just at what time a state might

[1] Elliot, vol. iv, p. 532.
[2] Id. vol. iv, p. 546.

pronounce that a federal act was a palpable violation of its rights, he did not say, but he left the door open. Nullification was to be worked out in the practical administration of the government.

The Kentucky and Virginia resolutions embodied the famous "doctrine of '98," and undoubtedly expressed the belief of the majority of the voters of the time. That this is true is shown in the elections of 1800, which put the democratic party in possession of the legislative and executive branches of the government. The campaign against the alien and sedition laws, which Jefferson and his friends began in 1798, had widened into a state movement and had taken permanent form in the organization of a great political party, which, by its representatives in the House, was able, on the 17th of February, 1801, on the thirty-sixth ballot, to elect Jefferson President of the United States. The repeal of the alien and sedition acts followed soon after. The triumph of the Democratic-Republicans in 1800 seemed to establish the doctrines of the Kentucky resolutions. If they truly expressed the ruling principles of the American government, then the state legislatures were the final arbitrators [1] in all cases in which the constitutionality of an act of Congress was in doubt.

An opportunity to apply the doctrine of '98 arose soon after the inauguration of Jefferson, out of the question of the constitutionality of the purchase of Louisiana. While the Constitution was before the states for ratification, the Mississippi question was one of the important matters demanding solution. The members of the Virginia convention from the western, or Kentucky, district had resolutely stood out against ratification till convinced by Madison and Marshall, and by other supporters of the Constitution, that the new government did not intend to surrender the Mississippi to Spain. In North and South Carolina, whose territory extended westward to the great river, opposition was in part allayed by the same under-

[1] *Per contra* Story's Commentaries, p. 1637; Marshall, p. 227. United States *v.* Peters (1809), 5 Cranch, 115; Gibbons *v.* Ogden (1824), 9 Wheaton, 1.

standing. On the 1st of October, 1800, Spain ceded Louisiana to France, but the cession in no wise diminished the danger to American interests. A foreign power still controlled the mouth of the Mississippi, and one more to be feared than Spain. Jefferson promptly declared that the possessor of New Orleans must be the natural and habitual enemy of the United States,[1] and he instructed Livingston, our ambassador at Paris, to begin negotiations with France for the acquisition of the two Floridas and of the island of Orleans. As Napoleon was at this time dreaming of a vast colonial policy, the matter received little attention. The disasters which soon overtook him compelled him to change his plans, and he let it be known to the American ambassador that he would sell Louisiana to the United States. Such an opportunity could never occur again. On the 30th of April, 1803, a treaty was signed at Paris by which the United states acquired all of Louisiana for fifteen million dollars.[2] By the terms of the treaty, the inhabitants of Louisiana were to be incorporated in the Union and as soon as possible were to be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and they were to be protected in the enjoyment of their liberty, property, and religion.[3] A reciprocity clause opened the port of New Orleans for twelve years to the commerce and manufactures of France, Spain, and their colonies, but no other nation was entitled to like privileges.

Though the purchase was of immeasurable importance to the Union, its constitutionality was quickly attacked by the Federalists, yet not by the most famed member of the party; for Hamilton, who, though seldom agreeing with Jefferson, now agreed with him, that the unity of the United States and its best interests required the annexation of all territory west of the Mississippi.[4] The

[1] April 18, 1802; Works, vol. iv, p. 431.

[2] The aggregate cost for purchase money, interest, and claims assumed by the United States, paid to June 30, 1880, was $27,267,621.98; Donaldson's "Public Domain," p. 105.

[3] Article III; Treaties and Conventions, p. 332.

[4] Works, vol. vi, p. 541.

whole transaction was without precedent in our annals. Livingston and Monroe, who had conducted the negotiations, acknowledged that they had exceeded their instructions, but at the same time were fully aware that they were carrying out Jefferson's wishes. The only thing for the President to do was to have the treaty ratified as soon as possible and without debate, for he knew the constitutional difficulty in the way. His plan, which was executed to the letter, was made easy by a republican majority in both Houses. On the 19th of October the senate ratified the treaty by a vote of twenty-four to seven, — ten votes to spare; and the House, with equal promptness and zeal, voted the necessary appropriations and organized a territorial government, but, strange to say, on a monarchical plan; for they empowered the President, in the first act of the session, to take possession of the territory and to exercise military, civil and judicial powers over it at his discretion, till a territorial government in due form should be established.[1]

This unique law did not agree with Jefferson's principles of strict construction, but he approved it and at once carried it into effect. It gave the Federalists an opportunity to retaliate on Jefferson and accuse him of monarchical tendencies. John Randolph, the Republican leader in the House, even went so far as to attempt to prove that the acquisition strictly complied with the Constitution; but he doubtless knew better. Not one word in that instrument expressly authorized the purchase. Not one word of which we have record, spoken in the federal convention, intimates that the framers anticipated the annexation of the Louisiana country. The transaction was at variance with the ideas of the Fathers. Even the states had not been consulted, and by the doctrine of '98, of which Jefferson was the chief author, they were the final arbitrators of the constitutionality of the treaty.

In acquiring the vast domain, Jefferson showed statesmanship of the highest order. He simply ignored the Constitution and secured for the American people a region of country most necessary to their general welfare, and he

[1] October 31, 1803; Statutes at Large, vol. ii, p. 245.

acted the part of an honest man when he frankly admitted that the Constitution made no provision for acquiring foreign territory or incorporating foreign nations into the Union.

He confessed that he had done an act beyond the Constitution, but he believed that it was for the good of the country, and therefore Congress should ratify the treaty, pay for the acquisition, and then throw themselves on the country for doing an unauthorized act. But he thought that the position would be improved if the purchase was formally ratified in a constitutional amendment, and even went so far as to draw one up and wished to submit it to Congress. His political friends, wiser in this respect than he, but perhaps less scrupulous, failed to respond to his wishes and the matter dropped. Even while ignoring the Constitution, if it can be said that he did ignore it, but certainly in turning his back on his own party, Jefferson applied its teachings in a large way. He was right in believing that the majority of the American people would support him in his policy. He was considering the good of the whole people. His great act, therefore, remains unique in our history as a singular example of a party chief repudiating the doctrines of his political school long enough to carry through a transaction, every element of which contradicted those teachings. The acquisition of Louisiana was a fine, but not a final example of the elevation of expediency to principle without violation to other principles of republican government on which the American system rests.

The Federalists in like manner repudiated their party principles and attacked the transaction as unconstitutional. Necessarily their attack was weak, but what they lacked in argument they made up in threats. They declared that a constitutional amendment was a necessary preliminary to such a treaty, but the question was fully answered by Nicholson, of Maryland, that a sovereign nation always possesses the right to acquire new territory, and he cited the provision in the Constitution empowering Congress to dispose of and to make all needful rules and regulations respecting the territorial or other property of the United States; but this was a federalist argument and

was interpreting the Constitution on principles which the Republicans had all along held to be highly dangerous.

There was, however, another objection. Pickering, of Massachusetts, declared in the Senate that a transaction of this kind, which so seriously affected the Union, could not be made without the assent of each state. "In like manner as in a commercial house, the consent of each member would be necessary to admit a new partner into the company," [1] but this partnership theory of the government was not a true federalist doctrine. Though the Republicans had made great use of it in exploiting the Kentucky and Virginia resolutions, they saw no relevancy in it now. Some of them blandly asked the Federalists how this partnership theory could be harmonized with their theory of a national instead of a federal government? The debate was altogether curious. Federalists had turned Republicans, and Republicans had turned Federalists.

Hamilton was not the only broad constructionist who supported Jefferson. John Quincy Adams stood with him. Though differing as to the best means of removing all difficulty, Hamilton and Adams agreed that the purchase ought to be made. Adams favored ratification by the state legislatures as equivalent to a constitutional amendment, but this view squinted between the doctrine of '98 and the national doctrine of the Federalists, though it differed so widely from theirs that they straightway read Adams out of the party. Many of the Federalists, though not their greatest leaders, suddenly professed belief in the doctrine of '98, and advised its radical application. "Rather than approval of the treaty, let the federalist states secede from the Union," [2] but this program was too much for them, as at this time, only three states had federalist legislatures. Hamilton opposed this scheme, for he saw both its dangers and its absurdity. Some of the federalist leaders found themselves in correspondence with Aaron Burr, with what ultimate purpose is not exactly known, but apparently for secession. These disaffected politicians persisted in saying that the acquisition

[1] Debates of Congress, vol. iii, p. 13.
[2] Jefferson's Works, vol. iv, p. 542.

of Louisiana must injure the northern and eastern states beyond remedy. Not one Federalist anticipated the extension of slave territory which the purchase made possible, and no man at this time foresaw the effect which the acquisition was to have upon the history of the slave power.

The Republicans in their defence of the treaty made no hint at slavery extension. That evil was to come at a later day. The bitter controversy over the treaty in and out of Congress showed how political parties are dominated by their adhesion to expediency. The Louisiana purchase for a time exchanged the positions of Federalists and Republicans, nor did the irony of history cease with the close of the agitation. Twenty-five years after the purchase, the greatest of our judges, and one of the most uncompromising of Federalists, delivered an opinion, as chief-justice of the United States, which fully sustained the constitutionality of the purchase. The Constitution, said Marshall, confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory either by conquest or by treaty.[1] Marshall was chief-justice at the time of the acquisition of Louisiana. A few of the more radical members of the political party to which he belonged, and they chiefly resided in New England, advocated secession from the Union rather than acquiescence in the treaty. It is an interesting question whether, had the case which reached him in 1828 come before him in 1803, he would have given a similar decision. It may be confidently asserted, however, that he would not have sustained an act of secession.[2] In its constitutionality, the purchase of Louisiana became the precedent for all our later acquisitions.

The question of secession came up again four years after the purchase of Louisiana in connection with the embargo of 1807,[3] an act which bore heavily on the com-

[1] The American Insurance Company *et al. v.* Canter, 1 Peters, 511.

[2] Compare Cohens *v.* Virginia, 6 Wheaton, 377; Ogden *v.* Saunders, 12 Wheaton, 332.

[3] Act of December 22, 1807; Statutes at Large, vol. ii, p. 451.

merce and manufactures of the country, but most heavily on those of New England, where it provoked serious opposition. Its defenders claimed that it was made in the exercise of the war power and also under the authority of Congress to regulate commerce, but a great majority of the people of New England believed that the law was unconstitutional.[1] They said that instead of regulating commerce, it obstructed it indefinitely, for the law was perpetual. Therefore, they considered it a violation of the Constitution. Here was a fine opportunity for a New England state, and especially for Massachusetts, to declare, according to the doctrine of '98, that the embargo law was "a deliberate, palpable, and dangerous exercise of power not granted by the Constitution." It was deliberate because long continued; palpable, because no words in the Constitution, but only a violent construction of it, suffered the law; and it was dangerous, since it threatened utterly to ruin the most important interests of the state. But the state went no further than to petition Congress for its repeal, and with some effect.[2] Though a majority of the New England people believed that the law was unconstitutional, they were willing that the decision be made by the proper tribunal. It was made and it was made against them. The constitutionality of the law was sustained.[3] New England submitted and refused to apply the doctrine of '98.[4]

Hostility in New England toward the embargo merged finally into a settled hostility toward the whole republican theory of administration and found vent seven years later in the Hartford convention and in opposition to the second war with England. Though the convention was merely a vigorous expostulation by a few ardent Federalists against a political policy, it was construed by the Republicans as preliminary to an overt act of secession, and was long pilloried before the world as proof of the treasonable

[1] "Life of William Plummer," p. 369; Gould's Portland, p. 423.
[2] Benton's Debates, vol. iii, p. 629. Webster's Speech.
[3] Blake's "Examination of the Constitutionality of the Embargo Laws," U. S. District Court, Salem, Massachusetts.
[4] Webster's Second Speech on Foot's Resolution, Works, vol. iii, p. 327.

intentions of New England in 1814.[1] The East was far from enthusiastic in support of the war. The Federalists, the strongest party in that quarter, asserted that a conflict might have been avoided. They were sluggish as a party in responding to the call of the government for support, and some of them denied the constitutional power of the President to call out the militia.

This spirit raised a critical constitutional question, which, though it did not reach the supreme court till some years later, finally decided the matter at issue.[2] A militiaman in the state of New York refused to enter the service of the United States, when summoned by the President. The court before which the case came, by appeal, held that the authority to decide whether there was imminent danger of invasion rested exclusively with the President, and that his decision was conclusive for all persons. The power was to be exercised upon sudden emergencies and under circumstances which might be vital to the Union. A prompt and unhesitating obedience to order was indispensable. The law on the subject,[3] therefore, was constitutional, and every member of a militia company was amenable to it. The decision was far-reaching for it linked the military authority of the United States to the militia service in every state, and established beyond controversy the power of the President as commander-in-chief of the militia, when it is called into the national service. The decision went far to establish that authority which the national government possesses over individuals enunciated as a principle of government in "The Federalist":[4] the power to address itself to the hopes and fears of individuals.

The war of 1812 left a long train of political problems incident to the economic re-organization of the country. Of these the first, of great importance, was the question of the constitutionality of internal improvements. On this subject the constitution is not explicit. It empowers

[1] See Dwight's Hartford Convention and its Journal.
[2] Martin *v.* Mott, 12 Wheaton, 19 (1827). The decision was by Mr. Justice Story.
[3] Act of February 28, 1795; Statutes at Large, vol. i, p. 424.
[4] "The Federalist," No. XVI.

Congress to establish post-roads, to regulate commerce between the states, to control the territories, to levy taxes, to make appropriations, and, in brief, to make all laws which it may consider necessary and proper to promote the general welfare, but, in constitutional discussions, down to Madison's second administration (1813–1817), no party had arrived at the conclusion that the Constitution permits internal improvements at national expense. Jefferson, early in his second administration, informed Congress that there was likely soon to be a surplus in the treasury, and the question to what it should be applied must be answered. He pointed out two suitable objects, — internal improvements and public education; but he could find no authority in the Constitution to expend money for either of these purposes; therefore, he advised an amendment which would permit such applications of the public moneys,[1] and he repeated his recommendation in his last annual message.[2] His successors, Madison and Monroe, renewed the suggestion.[3] Its repetition must be accepted as evidence of a settled policy on the part of the Republicans, that internal improvements at national expense were not authorized by the Constitution.

The most elaborate argument on the subject was made by Monroe in his veto of the Cumberland road bill,[4] the longest message sent to Congress by any of our Presidents. He took up each clause in the Constitution, which by any construction could be applied in authorization of internal improvements, and after a most searching examination arrived at the conclusion that Congress had not been granted power to execute such improvements. These must be undertaken, if at all, by the states. Whatever the advantages which might accrue to the general government from such an undertaking, they would be no compensation for the violence done to the supreme law. He admitted that such improvements were of vital impor-

[1] Message of the President, December 2, 1806; Richardson, vol. i, p. 409.
[2] November 8, 1808, Id. p. 456.
[3] Madison, December 5, 1815, Id. p. 567; Monroe, December 2, 1817, Id. vol. ii, p. 18; December 3, 1822, Id. p. 191; December 2, 1823, Id. p. 207; May 4, 1822, Id. p. 142.
[4] May 4, 1822, Id. vol. ii, p. 144.

tance; but the only way in which they could be made was through an amendment to the Constitution. The states individually could not transfer the power to the United States, nor could the United States receive it from them. Any compact between the general government and a state, which was not common to all, would bear most pernicious consequences. Thus the answer of the Republicans to the demand for internal improvements at national expense in 1818 was *non possumus*. In this opinion Monroe strictly followed Madison, who in an earlier veto message had taken exactly the same ground.[1] These opinions, however, were not shared by the whole country, as the resolutions of the House of Representatives passed a year after Madison's veto indicated.[2] These asserted the right of Congress to make appropriations for such improvements, but as yet they had not the support of a majority of the people, and therefore were only the opinion of a minority party. The whole question of internal improvements involved the vital question of sovereignty. If the principle was admitted that the federal government was sovereign, then supreme economic interests might ignore state boundaries, and the economic welfare of the people would take precedence over the dicta of state sovereignty.

The treaty of 1803, by which Louisiana was acquired, bound the United States to protect its inhabitants in the enjoyment of their religion, liberty, and property. Slavery already flourished among them, and property included slaves. At the time of the admission of Louisiana[3] there were about one hundred thousand people in the entire acquisition, of whom twenty thousand resided within the present bounds of Missouri. In ten years (1810–1820) the population of Missouri increased to nearly seventy thousand, of whom ten thousand were slaves. In 1819 there were about sixteen hundred slaves in Arkansas. The treaty also provided for the admission of new states that might be formed out of the purchase, on an equal footing with the original thirteen; thus, the United States was under obligation to protect slavery and to admit new states from the region without discrimination.

[1] March 3, 1817; Richardson, vol. i, p. 585.
[2] March 4, 1818. [3] April 8, 1812.

In March, 1818, John Scott, the delegate in Congress, from Missouri territory, submitted a petition for its admission into the Union. At the next session of Congress, Henry Clay, the Speaker, on the 18th of December, submitted the Missouri petition to the House, but it was not seriously considered until the 13th of February, when the House discussed the report of the committee of the whole, which was in the usual form for the admission of a state, that its constitution be republican in form and not inconsistent with the Constitution of the United States. Tallmadge, of New York, immediately proposed two restrictions: first, against further introduction of slavery in the new country, except as a punishment for crime; and secondly, for the gradual emancipation of all slave-born children within the state at the age of twenty-five years.[1] The first restriction was taken from the ordinance of 1787, and the second was suggested by the practice of several northern states. Tallmadge and his supporters declared that the restrictions were just and expedient, but their opponents argued with equal vigor that Congress had no authority to impose conditions on a state government other than that it be republican in form. It was asserted that the authority of Congress was clear, as the Constitution authorizes it to dispose of and to make all needful rules and regulations respecting territorial and other property of the United States. In proof the restrictionists cited the enabling acts of Ohio, Indiana, and Illinois, which complied with the ordinance of 1787.

As Missouri lay directly west of these states, the restrictionists believed that it should be subject to the same anti-slavery law. But what of the treaty of 1803, which put Congress under obligation to protect the property of the citizens of the Louisiana country? True, replied the restrictionists, but nothing was said in the treaty about the organization of new states; and even if such a provision had been inserted, who would claim that a treaty made by the Senate and the President could bind Congress in the admission of new states? That it could not bind Congress was evident from the organization of the terri-

[1] February 15, 1819; Benton's Debates of Congress, vol. vii, p. 334.

tories of Louisiana and Orleans, and the admission of Louisiana into the Union. The enabling acts imposed conditions and thus settled the whole matter. If Congress had the power to purchase the Louisiana country, it had the power to regulate its territorial government and to provide for the gradual abolition of slavery within its limits.

But to exclude slavery would depreciate the value of its public lands. Not so, replied the restrictionists; the price would rise. Lands always sold higher in free than in slave states. The exceptions in the Constitution in favor of slavery and the slave states, the restrictionists argued, applied to the original states but not to new states. The Constitution guarantees to each state a republican form of government which would be violated if slavery was extended into Missouri. Clay replied that the proposed restriction would violate that clause in the Constitution which declares citizens of each state entitled to all the privileges and immunities of citizens of the several states, but he was promptly asked, whether slavery could be called a privilege. He feared that there would be no end of conditions if restrictions were allowed, but he was assured that the only one demanded was that of a republican form of government. Until 1808, said the restrictionists, the immigration or importation of slaves could not be prohibited by Congress, but that time had now passed, and immigration, if it meant anything at all, meant the transportation of slaves from one state to another. The time limit having long since expired, Congress was free to prevent a further extension of slavery. But to all these arguments of the restrictionists there was one constant rejoinder, that if the citizens of any one of the old states had the right to determine whether they would tolerate slavery, why should not the citizens of Missouri have the same privilege? The states were equal, sovereign, and independent, and if Congress discriminated among them the Union would be destroyed. Finally, in spite of the arguments against them, both the Tallmadge restrictions were adopted by the House, though by a sectional vote.[1]

[1] February 16, 1819; Benton, vol. vi, p. 450.

On the following day Taylor, of New York, moved that the clause excluding slavery should be embodied in the bill then pending for a territorial government for Arkansas.[1] This at once alarmed the supporters of slavery. Was slavery to be excluded both from new states and from territories? By what right could Congress impose a distasteful condition upon the citizens either of a state or of a territory? Were not the people themselves the proper judges of their constitutional rights? McLane, of Delaware, well knowing the interpretation which the southern people, and, indeed, the majority of the people of the United States put upon the ordinance of 1787, that the region north of the Ohio River had been given up exclusively to freedom, with the understanding that the region south of the line should be exclusively for slavery, now proposed that some line should be fixed west of the Mississippi, north of which slavery should be forbidden. It was believed that such an arrangement could easily be made, as the vast region west of the river would give ample room both for freedom and slavery; but the clause to forbid the introduction of slavery west of the Mississippi was lost by one vote. For the establishment of a dividing line the majority was two, but on reconsideration the matter was struck out; the small majority indicating the even division of opinions. Taylor then proposed the line of 36° 30′ north latitude. Several other lines were suggested, but Arkansas was organized as a territory without restriction of slavery. On the 17th of February the Senate took up the Missouri bill, struck out the Tallmadge amendments and passed the bill. Thus the House had passed a bill for the admission of Missouri with restriction of slavery, and the Senate had passed one without it; neither would recede from its position, and Congress adjourned.[2]

When it re-assembled, on the 6th of December, the Missouri question had become a great national issue, the first clearly defined sectional issue since the organization of the government. On the 8th, Scott, the delegate from Missouri, again presented petitions for its admission, and

[1] Benton's Abridgment, vol. vi, p. 666.
[2] Annals, p. 1572.

Strong, a New York member, announced that, at an early day, he would introduce a bill prohibiting slavery within the territories of the United States. Meanwhile the people of Maine had asked for admission, and a bill to that end was introduced in both Houses. The House bill passed on the 3d of January. Might not the fate of Maine and Missouri be settled by a single bill? On the 6th, the enabling act for Maine which had been passed by the House was taken up in the Senate, and it was proposed to incorporate within it a clause for the admission of Missouri. In vain did the restrictionists attempt further amendment by adding the clause from the ordinance of 1787, forbidding slavery; the Senate as a body had little sympathy with the idea. On the 18th, Jesse B. Thomas, a senator from Illinois, offered a bill which forbade slavery in territories organized north and west of the proposed state of Missouri, and it passed to a second reading.

Meanwhile, the state legislatures had taken up the Missouri controversy and were sending resolutions to Congress, some opposing, some favoring the restriction of slavery. The sentiment of the country was divided. Finally, by a majority of two votes, on the 16th of February the Senate united the enabling acts for Maine and Missouri.[1] Senator Thomas then proposed his compromise, that in all territories west of the Mississippi and north of 36° 30′ slavery should be prohibited, except within the limits of the state of Missouri.[2] On the next day he added a fugitive slave clause to the compromise, which as thus amended passed the Senate by a majority of thirty-four to ten. The Maine-Missouri bill, which now contained the Thomas compromise as it had passed the Senate, went to the House, but there it entered into a very different atmosphere. The House speedily rejected the Missouri rider and the Thomas amendment, and took up its own bill, which contained the Taylor restrictions, and the debate plainly showed that no bill was likely to pass that did not contain a clause of some kind restricting slavery. The Senate gave notice that it would insist on its amendment, and the majority seemed in favor of limiting slavery. The Senate gave notice that it would insist on its

[1] Benton, vol. vi, p. 450. [2] February 17, 1820; Id. p. 451.

own amendments, and the House, by a vote of ninety-seven to seventy-six, insisted on its disagreement to the Senate bill.

The situation was complex. The friends of Missouri were willing to vote the Thomas compromise because it would admit the new state with slavery, but they knew that the House would not pass the Maine and Missouri acts in one bill. There was only one means of solution, which Thomas proposed in the Senate; namely, a committee of conference. To this the House agreed. Meanwhile the House had passed its own bill with Taylor's restrictions, on the 1st of March, and sent it to the Senate.[1] On the next day the Senate substituted the Thomas compromise for the Taylor restriction, and returned the bill to the House. The two bills then went to the conference committee, which soon reported. The Senate should abandon its attempt to unite Maine and Missouri in one bill, and Maine should be admitted. The House should abandon the slavery restrictions within the state of Missouri; the Thomas amendment should be accepted and slavery be forbidden north and west of Missouri. The conference report was finally accepted on the 2d of March.[2] Maine was admitted, on the 15th, and the people of Missouri were authorized to frame a constitution.

The state convention assembled on the 12th of June, at St. Louis, and completed its work in seven weeks, but the constitution which it framed contained a provision, suggested by Thomas H. Benton,[3] which at once renewed the Missouri controversy. The general assembly of Missouri was instructed to pass, as soon as possible, such laws as might be necessary to prevent free negroes and mulattoes from coming into the state, or settling in it, under any pretext.[4]

On the 23d of November, the select committee of the House, to whom the Missouri constitution had been referred, made its report. Benton's provision was its chief theme. It might be repugnant to the Constitution, if it was construed as applying to citizens of the United States,

[1] Annals, p. 1572. [2] Id. p. 471.
[3] Thirty Years' View, vol. i, p. 8.
[4] Missouri Constitution, 1820, Article III, section 26.

but as the clause might be found in the laws of five states, it was not without precedent. If too broad a construction were put upon the provision affecting the privileges and immunities of citizens of the several states, their powers of self-defence would be broken, and the result would be a consolidated government. The constitutions of all the states in the Union settled beyond controversy the right of a state to discriminate between white and black men both in civil and political privileges. As soon as a people formed a state government, they became sovereign and independent, and the courts, not Congress, must determine the constitutionality of laws. The committee briefly concluded its report in favor of the admission of the new state of Missouri.

A new question was now before Congress. Granting that it could impose conditions upon a territory, was it true that it could impose them upon a state? The constitutionality of the Benton provision should be left to be determined by the supreme court. True, the clause excluded free persons of color who were citizens of another state, but they were excluded by state constitutions already in force. Why attack Missouri rather than any of these states? Missouri had organized a state government,[1] and was already sovereign. To this it was replied that Missouri was not yet a state, for her senators and representatives had not yet been admitted to Congress. Her constitution had not yet been approved, and her people had been authorized to form one that would not be repugnant to that of the United States. Whether her constitution was satisfactory could alone be decided by Congress. In seven states [2] free persons of color were citizens, and there was nothing in the constitution of these states prohibiting free men of color from voting. It was not claimed that the right of citizenship gave the right to vote, but only that the right of free locomotion was indispensable to citizenship.

The question of the status of free persons of color had not before arisen in Congress. There were more than

[1] XIX, Niles's *Register*, p. 51.

[2] New Hampshire, Vermont, Massachusetts, New York, Pennsylvania, North Carolina, and Tennessee.

three hundred thousand such people in the country in 1820, of whom nearly sixty thousand were males of voting age.[1] The subject of negro suffrage was a reform agitated in New York at this time, and was soon embodied in its constitution of 1821, which made explicit provision for admitting free negroes as electors. It imposed a property qualification of two hundred and fifty dollars in realty upon them, and required a longer residence than for white men; but having complied with these conditions, a free man of color in that state was empowered to vote at any election. At the time of the Missouri compromise the election laws of New York enabled free persons of color to vote. Such persons had voted in Tennessee[2] and North Carolina,[3] and had long been accustomed to vote in New Hampshire, Vermont, and Massachusetts; but public sentiment in the two southern states practically abrogated the right, and in New England, New York, and Pennsylvania, by the strict letter of whose law they might vote, public opinion practically kept them from the polls. But public sentiment was not the strict letter of the Constitution. This was evident from the debate in Congress on the constitution of Missouri. It was precipitated there somewhat suddenly by the motion of Cobb, of Georgia, presented on the 12th of January, 1821, that the journal should be corrected so as to read, "the state of Missouri," referring to three memorials on the public lands which had been presented to the House on the preceding day from the Missouri legislature. The vote was a tie. The House had refused to recognize Missouri as a state, therefore it must be a territory, but by a vote of one hundred and fifty to four it refused to designate it on the journal as a territory.

In the Senate, meanwhile, the committee to whom the Missouri constitution had been referred, had reported a resolution on the 29th of November, declaring the state admitted. The Benton provision was the subject of con-

[1] For their status in the country, see "The Constitutional History of the American People, 1776–1850," vol. i, chap. xii.

[2] Caldwell's "Constitutional History of Tennessee," p. 93.

[3] Proceedings and Debates of the North Carolina convention, June 4–July 11, 1835, pp. 355 and *passim*.

tention here as in the House. Eaton, of Tennessee, proposed to avoid all difficulty by declaring that the act of admission should not be construed as giving the assent of Congress to any provision in the Missouri constitution which might be contrary to the Constitution of the United States; but his proposition was rejected. The senators knew that in every state in the Union at this time there was an acknowledged discrimination against the African, whether slave or free. Morrill, of New Hampshire, proved from the records of his own state, and from those of Vermont and Massachusetts, that free men of color had exercised the privileges and enjoyed the immunities of citizens, which he thought was enough to warrant the rejection of the Missouri constitution. On reconsideration Eaton's amendment was then carried.

The House then took up the Senate resolution, admitting Missouri.[1] Clay promptly declared himself in favor of it, but most of the members from the slave states declared against it. Opinions were so various and conflicting that the House failed to adopt either the Senate resolution or one of its own. It was at this time that Clay came forward with another compromise. Let the Senate resolution be referred to a special committee of thirteen; substitute for the Senate resolution one admitting Missouri, upon the condition that the state should never pass a law preventing any description of persons from going into the state and settling there, who were, or who might become, citizens of any state in the Union. The legislature of Missouri should be given until the 4th of November to pass an act in conformity to the resolution and to communicate it to the President, who should proclaim the fact, and Missouri should be admitted without further action of Congress.

The House took up the report of Clay's committee on the 12th, and at first rejected both Clay's amendment and the Senate resolution, but reconsidered its action on the following day and resumed the debate. General Pinckney of South Carolina, a member of the convention that framed the Constitution, was at this time a member of the

[1] January 29, 1821.

House. He declared that he was the author of the clause [1] in the Constitution relating to the privileges and immunities of citizens of the several states, and that at the time he drew it, he knew perfectly that there was no such thing in the Union as a black or colored citizen, and that, notwithstanding all that had been said on the subject, he did not believe that such a person existed in 1821. He then proceeded to show that free persons of color had never been citizens of the United States, or possessed the rights of white men, and that they were incapable of exercising them.

The time for counting the electoral vote of 1820 was fast approaching, and the friends of peace and order were anxious to avoid possible tumult in case any effort was made to have the vote of Missouri counted. When the day arrived, and the vote of Missouri was announced, all semblance of order in the House vanished; but, happily, the result of the election did not depend on the three votes of Missouri; otherwise, so great was the excitement, there might have been civil war. The restrictionists were immovable in their hostility to the Benton clause in the Missouri constitution, but it was believed that the friends of the proposed state were willing to make a compromise. This condition of things made possible the amicable settlement which Clay now initiated. On the 22d of February, 1821, he moved for a grand, joint committee of conference. His wishes prevailed; the Senate concurred; the House elected twenty-three members, and the Senate appointed seven. Clay was made chairman of the House committee, and John Holmes, one of the senators from Maine, was made chairman of the committee from the Senate.[2] On the 28th the grand committee reported, and its conclusions after a short debate were approved by both Houses, but not until the 2d of March did its report become a law. The Missouri legislature should repudiate

[1] There is no other direct evidence that Pinckney was the author of the clause in question; see Madison's testimony, Elliot, vol. v, p. 578. But see a copy of Pinckney's draft, together with Prof. J. Franklin Jameson's critical remarks thereon, in the *American Historical Review* for April, 1903; also Professor Jameson's "Studies in the History of the Federal Convention of 1787," in the "Report of the American Historical Association, 1902," vol. i, pp. 89–167.

[2] Annals, pp. 1219 *et seq.*

the Benton provision. This it did in June, and, in August, President Monroe by proclamation declared that Missouri was a state in the Union.[1]

The constitutionality of the Missouri compromise was not decided in the courts until thirty-seven years had passed,[2] and the decision then rendered was speedily set aside by the civil war; but during the intervening time the question was discussed continuously in one form or another. At the time of the original agitation, the constitutionality of federal laws in restriction of slavery was maintained by no less an authority than John Jay, who held that the power of Congress to prohibit the importation and immigration of slaves was unquestionable, and applied alike to old states and to new, at its discretion. He considered slavery repugnant to the principles of the revolution.[3] Webster's opinion was embodied in a memorial, of which he was the author, against the extension of slavery sent forth by a meeting of the citizens of Boston.[4] He argued that the power to regulate commerce gave Congress complete authority to regulate, and therefore to restrict, slavery. But there were contrary opinions of which the most influential was Madison's,[5] declaring the restriction of slavery by Congress unconstitutional, and thus anticipating the decision of the supreme court in the Dred Scott case.

The controversy of the admission of Missouri into the Union clearly involved the supremacy of the principles of republican government, and chiefly the rights of the citizen and the sovereignty of the nation. There was bound to come a time when free persons of color, in a country in which most of the race were slaves, would be the anomalous factor in practical politics. If all negroes in America, in 1820, had been slaves, or all had been free men, the controversy over Missouri could not have arisen. But the anomaly of free negroes as citizens in a country in which the legal status of the race was for the greater part one of slavery, compelled one of three conclusions:

[1] Richardson, vol. ii, p. 95.
[2] Dred Scott *v.* Sandford, 19 Howard, 393 (1857).
[3] Jay to Elias Boudinot, November 17, 1819.
[4] Niles's Register, vol. xvii, p. 242; Wilson's "Rise and Fall of the Slave Power," vol. i, p. 150; see also Niles, vol. xvii, p. 241.
[5] Works, vol. iii, p. 149.

either the negro must be denied political rights, or the domain within which he might possess those rights must be clearly defined; or he must be admitted to political rights without discrimination. The essential question was whether, under the constitutions and laws in force in America, he had the same rights as the white man.

The agitation over Missouri brought to light the elemental forces in conflict within the country over slavery and the rights of free negroes. Had the federal government authority to restrict slavery by excluding it from any part of the public domain? Had it authority to prescribe conditions for the admission of a state into the Union which would recognize practically the citizenship of free negroes?

The controversy in 1820 terminated triumphantly for the principle that the sovereignty of the general government enabled it both to restrict slavery in territories, and to protect negro citizens as it would protect white citizens: a state could not refuse admission to either.

Looking backward now, upwards of a century after the time of this profound agitation, culminating in the Missouri compromise, we can see that the settlement of the controversy marks a distinct phase in the evolution of popular government in America. Unquestionably the agitation was the most serious and alarming which arose during the first half century of our national existence. The compromise was more than a mere giving and taking between the states and the United States. It was a clearer definition of national sovereignty and of federal relations than had before been made. It was a practical illustration and application of the principle laid down by Hamilton in "The Federalist," that "the government of the Union must possess all the means and have a right to resort to all the methods of executing the powers with which it is intrusted that are possessed and exercised by the governments of the particular states.[1] More than this, the government of the Union must possess and exercise the powers necessary to its own preservation,[2] and this

[1] "The Federalist," No. XVI.
[2] Id. No. LIX.

principle, truly applied, signifies more than the mere continuance of the Union. It signifies that the general government is identified with the essential interests of the entire people. Had Missouri, in 1821, been suffered to inaugurate a state government which would discriminate against citizens of other states and refuse them residence, the consequence must have been inter-state hostility. It mattered not whether other states so discriminated; or whether the objectionable citizens were negroes. The principle of equality, as a working power in a republic, was involved. It was the primary purpose of the Union to obliterate aggravating differences among the states. Thus the conclusion, in the case of Missouri, marks a phase in the evolution not merely of a doctrine in republican government, but also of a true, because an equitable, political economy. Of the two elements in the compromise of 1820, that affecting and recognizing the citizenship of free negroes was of greater importance than that limiting slavery by the parallel 36° 30′. If the citizenship of the free negro was once established, the time must come when negro slavery must cease. The mere limitation of slavery by an arbitrary line could not imply citizenship for the negro. The compromise of 1820 clearly marks also the close of a phase in the growth of popular government in America which may fittingly be called the era of federation. The experiment had worked; the political theories which took form with the revolution had proved administrable. Government is ever in a state of flux; crystallization may mean death. But organization means life. The principles laid down by the Fathers were becoming clear to the people. Actual participation in government enabled the people to grasp them. In 1820 there existed what did not exist among the people in 1787, a consciousness, however obscure, of nationality. Overhead there still hung the clouds of provincialism, and the economic isolation of groups of the people, North, South, East, West, and the more serious isolation incident to obstructions to the exchange of thought no less than of the material products of life, darkened and hindered progress. It was yet the day of small things, but the light of a more perfect union was breaking.

CHAPTER VIII

COMPROMISE

THE law of the Constitution has been written as clearly and authoritatively by custom and public opinion as by Congress or the courts, a truth well illustrated during the five years following the Missouri compromise. For three centuries European governments had looked upon the American continents as a free field for colonization, but the policy so long pursued received a sudden check. The Spanish American states in 1820 had revolted and were asking the United States for recognition. France, Russia, Prussia, and Austria, after the fall of Napoleon formed the Holy Alliance [1] for the purpose of maintaining peace and repressing revolutions within one another's territory. The revolt of the Spanish colonies in South America was immediately followed by the rumor that the Alliance contemplated their subjugation to Spain. But interference of this kind was considered with such disfavor by England that George Canning, then Prime Minister, suggested to our representative, Richard Rush, that the United States should take decided ground against it. The wishes of the British minister were at once communicated to President Monroe, and by him submitted to his cabinet and also to Jefferson and Madison.

In a brief and masterly review of the subject, Jefferson declared that the question involved was the most momentous which had come before him since that of American independence. "That," said he, "made us a nation; this sets our compass and points the course which we steer through the ocean of time opening on us," [2] and he laid it down as a fixed and fundamental maxim in our govern-

[1] September, 1815.
[2] October 24, 1823; Works, vol. vii, p. 315.

ment, that we should never entangle ourselves in the broils of Europe, nor suffer Europe to intermeddle with public affairs this side of the Atlantic. "America, north and south," said he, "has a set of interests distinct from those of Europe, and peculiarly her own. She should, therefore, have a system of her own, separate and apart from that of Europe." The governments of the old world were laboring to become the home of despotism, but our endeavor should be to make the western hemisphere the home of freedom. In the pursuit of our true policy only one nation, he believed, could disturb us and that was England. If we acceded to her propositions we would detach her from European alliances unfriendly to us and would bring her mighty weight into the scale of free government. "Great Britain," he concluded, "is the nation which can do us the most harm of any or all on earth; and with her on our side we need not fear the whole world."

Six days later Madison replied to the President [1] and in the same spirit. The opinion of the cabinet coincided with that of Jefferson and Madison.[2] Thus reinforced, Monroe sent a message to Congress proclaiming a policy which has ever since been known by his name, that the time had come when it was proper to assert as a principle in our government that the American continents, by the free and independent condition which they had assumed to maintain, were henceforth not to be considered as subjects for colonization by any European power.[3] The announcement was received with unconcealed delight [4] by the British ministry. Canning declared that it would prevent drawing a line of demarkation which he most dreaded, — the arraignment of America against Europe. Monarchy in Mexico and Brazil, he thought, "would cure the evils of universal democracy;" and prevent drawing this line. He wished to counterbalance the power and

[1] Works, vol. iii, p. 338.

[2] For the opinions of the Cabinet, see Adams's Memoirs, vol. vi, pp. 177 *et seq.*, November 7–26, 1823.

[3] December 2, 1823; Richardson, vol. ii, p. 218. December 7, 1824; Id. p. 260.

[4] Wharton's International Law, vol. i (First Edition), p. 276.

influence of the United States. He was far from desiring the extension of popular government, but the Monroe doctrine, if carried out, would aid Great Britain in executing her own plans. He welcomed the doctrine for its advantage to his own government and not, as Monroe primarily intended, and as Jefferson had expressed, because it would make the western hemisphere the home of freedom.

But Monroe was not the first American statesman to advocate this doctrine. Hamilton, in 1788, in "The Federalist" [1] had urged neutrality and a strong national government, remarking that our geographical situation gave us the ascendancy in American affairs, and that, if we were bound together in a strict and indissoluble union we would be superior to transatlantic influences and would be able to dictate terms between the old and new world. Washington enunciated the same doctrine as the true policy of the nation in his proclamation of neutrality of 1793, at the opening of the French revolution,[2] and again in his seventh annual message to Congress,[3] sent at the time when the French revolution was changing the political systems of Europe. He repeated his advice in his Farewell Address,[4] that we should steer clear of alliances with any portion of "the foreign world." Adams and Jefferson urged the same policy, though in very different ways. Adams supported the alien and sedition laws, because they contributed to this neutrality, but Jefferson commended the policy in his first inaugural as the one which nature had laid down for us,[5] and later in a message to Congress.[6]

When nearly eight years had passed and Great Britain was threatening to take possession of East Florida, Madison urged the seasonableness of declaring that the United States could not, without serious inquietude, see any part of a neighboring territory, such as Florida, in which we had deep concern, pass from the hands of Spain into

[1] "The Federalist," No. XI.
[2] April 22; Richardson, vol. i, p. 156.
[3] December 8, 1795; Id. vol. i, p. 182.
[4] September 17, 1796; Id. vol. i, p. 113.
[5] March 4, 1801; Id. vol. i, p. 321.
[6] October 17, 1803; Id. p. 357.

those of any other foreign power.[1] It was while the United States was engaged in the second war with England that the series of revolutions broke out in Mexico, Central and South America, which led American statesmen again to consider the application of the doctrine of neutrality, in a more practical way than before. Monroe, in his first inaugural, had urged that our military defences be strengthened and that we no longer rely upon our distance from Europe as our chief security.[2] The war of 1812 had impressively brought the idea of neutrality before the American people and led them to sympathize with the struggling republics south of them. The policy which Monroe's predecessors had advocated was, therefore, an easy one for him to follow, and the success which attended the revolutions in South America offered the occasion for the United States to apply the doctrine. The affairs of these southern republics were in such a stage, in 1817, that our government was obliged to pursue a policy of neutrality with Europe and of commercial reciprocity with them, thus marking a complete transition in our policy. These new conditions were the principal subject of discussion in Monroe's annual message, in 1817.[3] So complete was the change in our commercial relations with the world that from this time every political party has advocated a policy of neutrality.

In a later message[4] Monroe returned to the subject, announcing that the United States had good cause to be satisfied with the policy which it had adopted. During the summer of 1819 the revolutions in South America had gone so far that the new republics had assumed stable governments. Monroe commented on the evident inability of Spain to subdue her former provinces and urged the revision of our laws so as to prevent all violations of neutrality; but in his general discussion of the policy he carried its interpretation a step nearer one of a guarantee, by the United States, of republican institutions in both North and South America.[5] In 1824 the people of the

[1] January 3, 1811; Richardson, vol. i, p. 488.
[2] March 5, 1817; Id. vol. ii, p. 4. [3] December 2; Id. p. 11.
[4] November 17, 1818; Id. p. 39.
[5] December 7, 1819; Id. p. 54. Adams to Canning, October 2, 1820, Memoirs, vol. v, p. 182; see also Monroe's Fourth Annual Mes-

United States were more or less convinced that by the very form of their political institutions, and their situation in the world, they were under obligation to exercise their influence to protect the younger American republics.[1] Thus far our government had never been consulted respecting any European policy, and South America had been viewed by European nations as an open field to be exploited for their own interests at their will. This was the situation when Canning opened correspondence with our government on the subject in 1820.

The immediate effect of the promulgation of the doctrine was to assure the new republics their independence; but opinions have widely differed whether it pledged the United States to maintain a protectorate over them. There is no doubt that it put an end to plans of European intervention in American affairs and anticipated the retirement of Spain from the new world. In January, 1824, Clay offered a resolution in the House[2] embodying the doctrine, but it was not carried, and Congress has never incorporated it in legislation. The principle of the doctrine was, however, clearly laid down by the House of Representatives in its resolution of April, 1826, that the people of the United States, in case of European interference in American affairs, would consider themselves free to act as their honor and policy might at the time dictate.[3] The doctrine has been reasserted in later times, on critical occasions, by no fewer than seven of our Presidents,[4] and it may now be said to have become a part of the unwritten law of the land.

A question of constitutionality was raised at the time of enacting the tariff bills of 1789 and 1816, but it came

sage, November 14, 1820; Second Inaugural Address, March 4, 1821; Fifth Annual Message, December 3, 1821; special message, March 8, 1822, in Richardson, vol. ii; Gallatin to Chateaubriand, Gallatin's Writings, vol. ii, p. 271; Adams to the Russian Minister, Memoirs, July 17, 1823, vol. vi, p. 163; Adams to Richard Rush, July 22, 1823, Register of Debates, 1825–1826, vol. ii, part 2, p. 31.

[1] Webster's Works, vol. iii, p. 203.

[2] January 20, 1824; Benton's Debates, vol. vii, p. 650.

[3] April 20, 1826; House Journal, p. 451.

[4] Tyler, 1842; Polk, 1845, 1847, 1848; Buchanan, 1858, 1860; Grant (twice), 1870; Hayes, 1880; Harrison, 1889; Cleveland (twice), 1895.

up more forcibly with the tariff of 1824. The protectionists urged that the power of Congress to lay taxes, to regulate commerce, and to promote the general welfare, clearly gave authority for a law of which the chief purpose should be protection of American manufactures, and they used the argument, sustained by the supreme court at the time, that the powers granted to Congress were not to be construed strictly;[1] from which was deducible the conclusion that Congress was empowered to act at its discretion in levying taxes. But many supporters of the tariff took the view held by Webster that the whole question was one of expediency.[2] If protection was carried too far, it would destroy commerce, but the opponents of the protective feature in the tariff held to the doctrine which Webster enunciated in 1820, — that Congress had no power to declare what occupations should be pursued in society, and what should not. They held that Congress could exercise the right of taxation no further than to raise money necessary for the lawful purposes of the government. Any departure from this rule would violate the Constitution. But if the right to pass a tariff act depended wholly upon expediency, its exercise became purely a political matter and would depend upon the results of the elections. The tariff question was soon to bring the country to the verge of civil war.

Forty years had now passed since the making of the Constitution, but its general character was by no means yet agreed upon. The most important fact in its history was that it had proved a working system of government. Parties had struggled over its meaning, and the supreme court had handed down a number of decisions placing some of its principles beyond dispute. The states seemed to have fallen into their proper orbits. Less was now heard of the need of constitutional amendments. The government had proved its capacity to protect itself, and the Missouri compromise had demonstrated its sovereignty. The administration of John Quincy Adams, 1825–1829, was crowded with political problems, many of which were left

[1] Gibbons *v.* Ogden, 9 Wheaton, 1 (1824).
[2] Works, vol. iii, p. 94; Speech of April 1st and 2d, 1824.

unsettled. His nomination of special envoys to attend the Pan-American Congress, an assembly proposed by the new republics for the purpose of considering the interests of all America, precipitated a stormy debate in both Houses[1] over the diplomatic powers of the President; but the debate was rather for the purpose of accumulating political capital against Adams than to settle a constitutional question. The appropriation finally granted[2] for the envoys was a confession by Congress that the President had acted fully within his powers. The tariff of 1828, known as the tariff of abominations, renewed the whole controversy over the power of taxation and was the immediate cause of the fierce political struggles which followed.

Jackson came to the presidency in 1829, convinced that he was commissioned by the people to institute public reforms.[3] He declared that the revenues of the government ought to be raised without discrimination in favor of any of the important interests of the country, and referred with care to the distinction between the rights of the sovereign members of the Union and the powers which they had granted to the Confederacy,—the name by which he designated the national government. He believed that the powers of the President were limited to the administration of the laws. It was not long before he had ample opportunity to put his theories to the test. The tariff of 1828 was as provocative of critical events in our history as the alien and sedition acts. Five southern states[4] immediately protested against it as destructive of the best interests of their people, and for such protests against congressional legislation there were some famous precedents. Had not New England threatened to nullify the acts of Congress growing out of the Louisiana treaty of 1803? Had it not then threatened secession, and again, when the Hartford convention met? So, too, had not Georgia repudiated the decision of the supreme court in the Chisholm case, in 1793, and again, thirty-five years

[1] April, 1826; Benton's Debates, vol. viii, pp. 482, 534.
[2] April 22, 1826; Statutes at Large, vol. iv, p. 158.
[3] Inaugural, March 4, 1829; Richardson, vol. ii, p. 436.
[4] Virginia, North Carolina, South Carolina, Georgia, and Alabama; 1828 and 1829.

later, when she refused to abide by the decision of the court in the case of the Creek and Cherokee Indians.[1] The South was agricultural, and believed, primarily for that reason, that the tariff was inimical to its interests. It was on this economic interpretation of the tariff that the whole case of nullification rested. Low tariff and free trade opinions were by no means limited to the South. They were heard here and there all over the land.[2] But the classic and accepted exposition of all anti-tariff views was embodied in the South Carolina "Exposition" of 1828. Sympathizing with this, Calhoun elaborated its doctrine in one of the most famous letters in our history.[3] Before outlining this important letter it is necessary to trace, briefly, the course of events in Congress which may be said to have led up to it.

The tariff protests of the southern states were received by most of the protectionists as of no more importance than customary party resolutions. Their deep significance was not at first understood. Soon after their appearance a question relating to the public lands came up in the Senate,[4] and it was seized by the leaders of the nullification movement as an opportunity for attacking, not only the tariff, but the system of constitutional interpretation which it exemplified. The southern protests represented the tariff as a discrimination against portions of the Union; and declared that Congress had exceeded its powers, and had violated the true meaning of the Constitution by imposing burdens of taxation unequally upon the several states of the Confederacy.

The debate on the Foot resolution attracted slight attention till the 19th of January, when Senator Hayne, of South Carolina, made a powerful speech, in which he

[1] Niles's *Register*, vol. xxxvi, p. 258; vol. xxxvii, p. 189; vol. xliii, p. 227. Worcester *v.* State of Georgia, 6 Peters, 515.

[2] See Preamble and Resolutions adopted at the Exchange Coffee House, Preparatory to choosing delegates to the Anti-tariff Convention, Boston, August 16, 1831; Journal of the Free-Trade Convention, Philadelphia, September 30–October 7, 1831; Memorial Address of its Committee to the People of the United States, New York, 1832.

[3] To James Hamilton, Governor of South Carolina, August 28, 1832; Calhoun's Works, vol. vi, pp. 144–193.

[4] Foot's Resolution on the Public Lands, December, 1829.

charged New England with harboring the design of checking immigration into the West and South, and called upon those portions of the country to unite against the East in a policy of free trade and public lands on easy terms. To this attack on his native region Webster replied,[1] on the following day, and showed how groundless were Hayne's charges. His speech was a concentration of merciless logic which, he believed, reduced Hayne's accusations to absurdity. Mr. Webster's manner rather than the matter of his speech offended Hayne, who, on the 21st, again addressed the Senate,[2] and particularly Mr. Webster (who he insisted should be present), on the great question of the time, and indeed, of all time, the foundations of our government. The primary question, he said, was whether the colonies, when they became independent nations, intended to form a federal or a national Union. The question was older than the government, for it had been discussed to the last detail in the ratifying conventions of 1788.

Mr. Webster had ridiculed the idea, embodied in the South Carolina protest, that a state has a constitutional remedy, in the exercise of its sovereign authority, for a gross, palpable, and deliberate violation of the Constitution. He had stigmatized a union on such a basis as a mere rope of sand. But the weight of Webster's personal authority had not satisfied Hayne. He threw into the opposite scale the authority on which, he said, South Carolina relied, — the doctrine contained in the report of its legislature in December, 1828, and known as the "South Carolina Exposition." He believed that this authority far outweighed Webster's personal opinions; for it was "the good old republican doctrine of '98, — the doctrine of the celebrated Virginia resolutions of that year and of Madison's report of '99, that the powers of the federal government result from the compact to which the states are parties; are limited by the plain sense and intention of the instrument constituting the compact, and are no further valid than as they are authorized by the grants enumerated in that compact." In case of a deliberate, palpable,

[1] January 20, 1830; Works, vol. iii, p. 248.
[2] Johnston's American Orations, vol. i, p. 213.

and dangerous exercise of powers, not granted by the compact, the states, which he said were the contracting parties, had the right and were in duty bound to interpose for arresting the progress of the evil and for maintaining, within proper limits, their own authorities, rights, and liberties. Nor was this all. Kentucky had responded to Virginia, and, on the 10th of November, 1799, had sent forth, through its legislature, the celebrated resolutions penned by Jefferson, which declared that the states, each acting for itself, were the final judges of the extent of power delegated to the general government. The doctrine of these resolutions, continued Hayne, had gone to the country, had become a great issue in 1800, and had been settled by the election of Jefferson, and by turning over to him and his associates the control of the federal government, and, as Jefferson himself had said, had thus saved the Constitution at its last gasp.

Elaborating this idea in masterly style, Hayne concluded with the assertion that the tariff had prostrated, and would soon ruin, the South; but this great disaster, he said, was not the chief ground of her complaint: it was the principle involved in the contest which concerned her. The discretion of Congress had been substituted for the limitations of the Constitution, and thus the states and their people had been brought to a dependence on the vote of the federal government, and were left nothing which they could call their own. If opposition continued, there remained only one remedy, that which the immortal Hampden had applied, — "resistance to unauthorized taxation."

The South thus spoke with no uncertain doctrine and in no uncertain tone. If a reply could be made, who was there to make it? Those who had listened to Hayne, and who sympathized with him, believed that the strength of his speech lay in the historical and economic treatment of his subject. Many who heard him were living when the Constitution was ratified, and they remembered the opinions of that time. They knew that ratification had been a federal not a national act, and that the states had then jealously asserted their claims to sovereignty. They knew that while Hayne was speaking, Madison, the author of the Virginia resolutions and of the report which Hayne

had cited as his chief authority, was yet among the living, and was the most venerated man in America. They knew that the Union almost from its inception had been under the control of the South. Southern statesmen had directed its policy and filled its most important offices. They knew that the American people had long since favorably accepted the doctrine of '98, and that the party which stood for that doctrine had been in power in both Houses of Congress, and had filled the office of chief magistrate, save during what they considered the interregnum of John Quincy Adams, since the election of Jefferson.

Only one man could reply to Hayne, and his friends were not sure of him. Webster had sat, a most attentive listener, throughout the speech; but even the New England delegation, and those who knew him best, faltered in their hopes that he could make an adequate reply. Senator Bell, of New Hampshire, plainly stated his fears to Webster, remarking, somewhat sadly, that it was high time that the people of the country knew what the Constitution meant. "By the blessings of Heaven," answered Webster, "they shall learn this day, before the sun goes down, what I understand it to be."

Of the reply which Webster made to Hayne on the 26th and 27th of January [1] the world has long made note. He spoke of the Union as it was in 1830, not as it existed in its infancy and during its early struggles. The nation was no longer a mere compact, but a living, breathing, sentient organism. The Union was an object of human sentiment and affection, not a mere legal contract between thirteen governments in thirteen petty states. Every point made by his adversary was answered, but all not equally or fully. The strict letter of the law and the history of the country were largely on Hayne's side. He knew his ground, and had made the most of its opportunities. Webster, equally familiar with our history, knew the weakness of the South Carolina doctrine as a fixed national policy. He knew that no government can be administered solely on its history. He knew that the organic life of the Union is the true corrective of its history, and therefore

[1] Works, vol. iii, p. 270.

he raised the whole discussion to a higher level than Hayne had attained. It was time to leave the past with its abstractions, its doctrinaire policies, its hair-splitting distinctions in constitutional construction, and to turn to the American people as a nation among the powers of the earth. The moral comprehensiveness of the sentiment of union must forever efface the doctrine of '98. Hayne had rebuked New England for disloyalty at the time of the Hartford convention. Webster replied that if New England had been disloyal, and he said that she had not been disloyal, Hayne should extend his buffetings in like manner to all similar proceedings, wherever else found.

Turning to the main proposition, on which he said the whole debate hinged, the question was, "Whose prerogative is it to decide on the constitutionality or unconstitutionality of the laws?" He did not defend the tariff, nor attempt to prove that a policy of protection is essential to the maintenance of the Union. He discussed the issue from a larger outlook, maintaining that the Union could not endure, if its own judgment was not final on the constitutionality of its laws. This raised the question of sovereignty, and he planted himself by the side of the authors of "The Federalist." He argued for sovereignty in the nation and for residuary sovereignty in the states.[1] Like William Penn of old, Webster placed the power with the people, in whom he declared is ever to be found the ultimate political sovereignty of the nation. And then he gave that definition of the Union which may be said to be the most complete in our history. "I hold it to be a popular government elected by the people; those who administer it responsible to the people, and itself capable of being amended and modified just as the people may choose it should be. It is as popular, just as truly emanating from the people as the state governments. It is created for one purpose, the state governments for another. It has its own powers, they have theirs. There is no more authority with them to arrest the operation of a law of Congress than with Congress to arrest the operation of their laws. We are here to administer a Constitution emanating immedi-

[1] "The Federalist," Nos. XXXII, LXXXI.

ately from the people and trusted by them to our administration. It is not the creature of the state governments." Direct collision, therefore, between force and force, said he, must be the unavoidable result of the remedy for unconstitutional laws for which Hayne had contended. The South Carolinian's doctrine, said Webster, went the length of revolution. It was incompatible with any peaceful administration of the government, and led directly to civil commotion and disunion. When Webster had concluded, and the last words of his speech, "liberty and Union, now and forever, one and inseparable," had ceased reverberating through the Senate chamber, no man who heard him was longer in doubt what the Massachusetts statesman understood by the Constitution of the United States. His great speech went forth to the world, and lovers of the Union everywhere hailed him as the "Expounder and Defender of the Constitution."

Calhoun, who sat opposite Hayne, during his speech, drank in his words and was satisfied. Nullification had found a voice more eloquent though no more faithful than his own. The youth of the South henceforth need only to recite the burning words of Hayne to arouse an oppressed people to sacred resistance to unjust laws, and history was to be Hayne's best friend. His speech passed at once into literature, and became a popular selection at school and college. Whatever he had failed to do, Hayne had not failed to embalm his memory in the minds of the southern people. So, too, did Webster's reply pass into our literature. Cicero took delight that during his lifetime the boys of Rome were taught in the schools to recite his orations. Webster's reply to Hayne was honored in like manner. The memory of thousands to-day goes back to the district schoolhouse, sunning itself beside the dusty road, and to the time when the neighborhood gathered within it to hear the boys declaim. One recited Hayne's speech and another Webster's reply, and even feeble repetition stirred the passions of the listeners. It was a tribute to the power of ideas. Webster's reply is a mile-stone in our constitutional history. It was the first forensic utterance which put our political institutions into perspective and clothed them with the imperishable beauty of liter-

ature. It projected them into all time. Appealing to the sensibilities of the American people, he put their aspirations into palpable form, and since the day of his great reply to Hayne, writers and speakers of every political school have quarried from the rich mines of his imagination and eloquence.[1]

Webster forsook economic ground and made his argument almost wholly constitutional. The two debators were advocates of antagonistic political systems. At the time when they spoke, industrial homogeneity did not exist in the United States, and without homogeneity it is impossible to have a national Union. Thus the discussion was largely one of abstract propositions, not of concrete, industrial interests. Had Hayne limited the discussion to economic conditions, it has been said that Webster never would have presumed to make reply; but as soon as Hayne attempted to meet Webster on constitutional grounds he was defeated.

The great debate by no means settled the question at issue. South Carolina called a convention,[2] which issued an ordinance of nullification.[3] The governor about the same time sent a message of like import to the people of the state.[4] Calhoun resigned the vice-presidency in order to be free to defend nullification. It is his great defence in his letter to Governor Hamilton which embodies the most complete exposition of the doctrine. This celebrated letter, though it may more properly be called a treatise on nullification, followed the lines which Jefferson had drawn in the Kentucky resolutions. The Constitution, according to Calhoun, was framed and adopted by the states and not by the people of the United States. Collectively the people had never performed a single political act. Between the individual citizens of a state and the general government there was no direct and immediate connection; the relation was through the state; therefore, the Union was one of states as communities and not one

[1] For Lincoln's reference to him, see Herndon's Lincoln (Ed. 1889), pp. 400, 478.
[2] October 24, 1832; Niles's, vol. xliii, p. 152.
[3] November 24th; Congressional Debates, vol. ix, App. p. 154.
[4] November 27, 1832; Niles's, vol. xliii, p. 159.

of individuals. The Constitution had been submitted to the states for their separate ratification, and the ratification of any other state, or of all the others without its own, created no connection between a state and the general government, and imposed not the slightest obligation. Thus, said Calhoun, North Carolina and Rhode Island for a time stood in the relation of foreign states to the general government. As a sovereign body in the Union, a state was empowered to declare an unconstitutional act of the general government null and void.

Calhoun did not claim that a state had the right to abrogate an act of the general government, for he conceived that the Constitution itself annulled an unconstitutional act. Such an act was void of itself. He claimed that the state had the right to declare the extent of its obligation; from which it followed that the citizen was bound primarily to obey every act of the state. The Constitution was analogous to a treaty entered into by a sovereign state without consulting its citizens; from which it followed that the general government was the mere agent of the states, and to them the United States was responsible. This interpretation, he claimed, agreed with the original intention of the makers of the Constitution, who had not authorized the general government to exercise any control over a state in any way. They had even refused this high power to the supreme court. The general government was purely a confederation. In the case of the alien and sedition laws the government had been saved from the consequence of its own errors by public opinion. Nullification was the rightful remedy for its unconstitutional acts. It could not coerce a state, nor, without violating the Constitution, infringe upon any rights of the states. Nullification might result in secession, which would be placing a state beyond the pale of her federal relation, so that a state would stand to the others in the relation of a foreign power. He distinguished between nullification and secession; the one being a reference of disputes to the parties themselves, the other to their agents. The purpose of secession would be the dissolution of the Union, but nullification was to confine the

agent within the limit of his powers; therefore nullification was the true constitutional remedy for unlawful acts of the general government.

These ideas, composed in less technical form and addressed to the people of the United States, were sent forth by the South Carolina convention of November, 1832.[1] The convention had declared the tariff laws, and particularly the acts of Congress of May 29th, and July 14, 1832, null and void. True to the theory long held at the South, the nullifying act was done by a sovereign convention especially called for the purpose and not by a state legislature.[2] The ordinance of nullification led the President to issue a proclamation in which he tersely defined the issue, and which remains the most famous of his state papers. "I consider the power to annul a law of the United States assumed by one state," said Jackson, "incompatible with the existence of the Union; contradicted expressly by the letter of the Constitution; unauthorized by its spirit; inconsistent with every principle on which it was founded and destructive to the great object for which it was formed."[3] The proclamation was followed on the 16th of January by a nullification message,[4] in which the ordinance was exhaustively discussed and the relations between a state and the United States set forth. The proclamation and the message immediately raised Jackson to a degree of popularity, and with many it must be said of unpopularity, which few Presidents have known. The response of public opinion was immediate and overwhelming, and from no source was it more vigorous than from the state legislatures, which with few exceptions passed resolutions commending the President's course and condemning that of South

[1] Journal of the Convention of the People of South Carolina, assembled at Columbia on the 19th of November, 1832, and again, March 11, 1833; Reports and Ordinances, Columbia, 1833.

[2] For the doctrine of sovereignty in the convention see the report of the chief of the department of justice and police on the powers of the convention (I. W. Hayne to Governor Pickings) in the Appendix of the Fourth Session of the Convention of the People of South Carolina, held in 1860, 1861, 1862; Columbia, South Carolina, 1862, pp. 649, 667; also Sproule *v.* Fredericks (1892), 62 Mississippi, 898.

[3] December 10, 1832; Richardson, vol. ii, p. 640.

[4] Id. p. 610.

Carolina.[1] But it was the action of the President and of Congress which constituted the most important reply to the ordinance and to the argument of Calhoun in his letter to Governor Hamilton. The President sent troops to South Carolina,[2] and appropriations were made to collect the duty by force.

Amidst the agitation, the compromise tariff act of 1833, originated with Clay, was passed,[3] as a result of which the South Carolina ordinance was suspended and soon after repealed.[4] The conclusion of the whole matter is depicted in a private letter[5] sent to President Jackson from Columbia by one of his political lieutenants on the day after the repeal by the convention. Only four nullifiers had voted against the repeal, and chiefly because they thought that Clay's bill "did not fully abandon the principle of protection." But McDuffie, who had been most aggressive for nullification, spoke lovingly of Clay as "our great ally in the West, whom we have recently gained," and congratulated the convention on the triumph of nullification through Clay's compromise act. Governor Hamilton made a conciliatory speech. Jackson's opinion was endorsed on this letter in his usual unique and forceful style. "The Ordinance & all laws under it repealed — so ends the wicked & disgraceful conduct of Calhoun McDuffie & their co nullies. They will only be remembered, to be held up to scorn, by every one who loves freedom, our glorious Constitution & government of laws."

On the constitutionality of nullification men differed then as they differ now. The issue was as old, and even older than, the government, and involved the question whether the Union was a Confederacy or a nation. To the

[1] For a typical set of resolutions (with citation of those of other states), see the resolves of the General Court of Massachusetts, January, 1832–April, 1834, pp. 290–408, 646; see the New Hampshire resolutions against legislation "On the Subject of the Tariff and the Doctrine of Nullification," July 6, 1833. Laws of New Hampshire, Concord, p. 137.

[2] October 29, 1832; Congressional Debates, vol. ix, App. p. 187, *et seq.*

[3] March 2, 1833; Statutes at Large, vol. iv, p. 629. The Force Bill passed March 2, 1833.

[4] March 16, 1833; Statutes at Large, vol. iv, p. 632.

[5] Augustus Fitch to the President of the United States, Columbia, S. C., March 16, 1833, MS. letter.

arguments of Webster and Calhoun on this question nothing has ever been added. The issue running to the very vitals of the government was settled at the time partly by the vigor of Jackson and partly by the compromise measure of Clay. The pacificatory act with which Clay's name is associated reduced the tariff by a definite scale, and without abandoning the theory of protection, practically made the concession which moderate anti-tariff men at the South demanded.

In all his acts Jackson carried out the conception formulated in his inaugural, — that he was especially commissioned by the people to conduct a reform in the administration of the government, and the vigor with which he handled the nullification question was displayed in all his works. In his message vetoing the act to recharter the United States bank, he took issue with the supreme court as to the constitutionality of the bank, and insisted that it was neither necessary nor proper for Congress to transfer its legislative power to a bank: therefore, the act creating it was unconstitutional. Congress, the executive and the court, he said, must each for itself be guided by its own opinion of the Constitution. "Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others," from which it followed that it was as much the duty of the House of Representatives, of the President and of the Senate to decide upon the constitutionality of an act as it was of the supreme judges before whom it was brought for settlement.[1] "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the supreme court must not, therefore, be permitted to control Congress or the executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."[2] This was a novel theory of constitutional interpretation, but it harmonized strictly with the form of

[1] See *per contra* Webster, vol. iii. pp. 416, 432.
[2] Veto Message, July 10, 1832; Richardson, vol. ii, p. 582.

Jeffersonian democracy which Jackson developed, and was accepted by the party to which he belonged. As Jackson applied the doctrine, it made him the most popular President in our annals. He considered the bank dangerous to the safety of the government and to the morals of the people as well as unconstitutional; therefore, as part of his policy he directed the secretary of the treasury no longer to deposit the money of the United States in the bank, but to deposit it in state banks which he designated.[1] The secretary, Taney, defended the removal on the ground of expediency. The re-election of Jackson was understood by his followers to have settled the question of the constitutionality of the bank.

The secretary's course was fully investigated in the Senate. On the 26th of December Clay declared against the President. He took issue with Jackson that his re-election, however it might be construed as expressing the will of the people, did not authorize him to do unconstitutional acts, and he offered two resolutions: the first declaring that the President had assumed the exercise of a power over the treasury not granted him by the Constitution, and the second, that Taney's reasons for the removal were insufficient.[2] There was nothing new in the long debate which followed, as all the arguments had been heard at the time of the first bank controversy. The friends of the bank argued that the President's conduct violated the principle of contracts which the supreme court had laid down in the Dartmouth College case.[3] The immediate result of the debate was a resolution of censure of the President, passed by the Senate, and embodying the constitutional views which Clay had expressed. The President protested against this left-handed method of impeachment,[4] and, with his friends, began a vigorous campaign, which resulted, three years later, in the adoption of a resolution by

[1] R. B. Taney, Secretary of Treasury, December 4, 1833; Executive Document, No. II, vol. i, 1833–1834.

[2] Benton's Debates, vol. xii, p. 208.

[3] Dartmouth College *v.* Woodward, 4 Wheaton, 518 (1819); also Providence Bank *v.* Billings *et al.*, 4 Peters, 514 (1830), both decisions by Marshall.

[4] Jackson's Protest, April 15, 1834; Richardson, vol. iii, p. 69. The Senate ordered that it be not entered on the Journal.

the Senate, by which the record of Clay's vote of censure was expunged from the journal. Webster, and others of the whig party, protested against the unconstitutionality of a resolution thus altering the records, but the democratic majority practically settled this point when it ordered the resolution expunged and carried out the order.[1]

Clay and his disciples, who saw no constitutional obstacle to internal improvements at the expense of the general government, were utterly unable to harmonize Jackson's attitude toward nullification with his vetoes of internal improvement bills. The contradiction is not difficult to explain, if we remember that Jackson, at heart, was a believer in the sovereignty of the state over all matters exercisable wholly within its limits. He accepted the practice of the government in the question of sovereignty, and held that the power to carry on internal improvements within a state, at federal expense, though frequently and strenuously attempted, had never been exercised by the government. He believed that Congress possessed no such power, and early in his administration announced that no bill which admitted it would receive his official signature. He cited Jefferson, Madison, and Monroe as authorities for the opinion that the only cases in which the consent and cession of particular states could extend the power of Congress were specified in the Constitution; therefore, he opposed every bill which appropriated money from the national treasury for internal improvements in a state, even if the state had consented and Congress had disclaimed any jurisdiction.[2] But this view of the Constitution, which forbade internal improvements, enabled Jackson to advocate the distribution of the treasury surplus among the states in 1836. Testing his interpretation of the Constitution by the opinions of earlier statesmen, it will be found that he and they held to the doctrine of residuary sovereignty in the states advocated by Hamilton and Marshall, and sustained by the supreme court in later times.[3] Jackson differed from our earlier,

[1] January 16, 1837; Benton's Debates, vol. xiii, p. 155.
[2] Veto Message, May 27, 1830; Richardson, vol. ii, p. 483.
[3] As in Texas v. White, 7 Wallace, 700 (1868).

and especially from our later statesmen, in the quantity of residuary sovereignty which he imputed to a state. His pet theory of administration was to preserve the nice adjustment of sovereignty in the nation and of residuary sovereignty in the states which the fathers had attempted in the Constitution.

Van Buren, at the time of his inauguration as President, commented on the nice balance of power between the federal and the state authorities as the chief object of his administrative care. His opinions of the Constitution re-echoed those of his illustrious predecessor, and he asked no more than that his own administration might continue Jackson's policy. The most important positive declaration in his inaugural was that of his inflexible and uncompromising determination to oppose the abolition of slavery in the District of Columbia against the wishes of the slave-holding states, and to resist the slightest federal interference with slavery in states where it existed.[1] But there were forces at work in the land of which the President made at least no public note. In the early days of December, two years before the election of Martin Van Buren to the presidency, sixty persons assembled in the city of Philadelphia and organized the American Anti-Slavery Society. Among that company were Arthur Tappan, William Lloyd Garrison, Robert Purvis, John Greenleaf Whittier, and Lucretia Mott. The object of the society which these earnest people then proceeded to organize was nothing less than "the entire abolition of slavery in the United States."[2] No organization devoted to a more stupendous task was ever formed. Its members were looked upon as fanatics, and their purpose as hopeless of realization. The constitutions and laws of the country were against them, and no existing political party would tolerate them. Yet these private citizens, most of whom were obscure men and women, calmly, yet boldly, organized a movement which was to transform government and the conceptions of government in America. Van Buren's inaugural was interpreted by the pro-slavery men as a promise on the part of Van Buren that he would with-

[1] March 4, 1837; Richardson, vol. iii, p. 318.
[2] December 4, 1833; Macdonald, p. 304.

stand every attempt of the abolitionists even to petition Congress for the overthrow of slavery. The constitutional aspect of his administration is chiefly of interest on account of the efforts which the pro-slavery party made to deny the right of petition when exercised for the abolition or restriction of slavery. Calhoun did not hesitate to pronounce such petitions a violation of the federal compact,[1] and throughout Van Buren's term the pro-slavery party attempted to administer the government on the basis of Calhoun's interpretation. But the right of petition was too ancient and well settled, and too well acknowledged as essential to a republican form of government to be questioned; therefore, Calhoun's resolution, that Congress would not receive abolition petitions, precipitated a debate which continued practically throughout Van Buren's term. Reviewing the period from the point of time at which we now stand, we can easily see that the true objection, if there could be any, to petitions of any kind was against their expediency rather than against their constitutionality; but in the heat of party passion their inexpediency was considered by pro-slavery men as proof of their violation of the Constitution. In conformity to pro-slavery sentiment the right of petition was attacked and the House passed its notorious gag rule,[2] by which, on a motion for the previous question, debate could be cut off. For seven years this mere rule of the House violated a principle of the Constitution. It may be said that from the adoption of this rule dates the national movement against slavery.

The election of Harrison and Tyler, in 1840, was hailed by the Whigs as the opening of an age of reform. Whig principles of construction would now triumph, and whig principles were supposed to be broad and liberal. But the sudden death of the President struck down their hopes. Tyler had never been a whig, nor sympathized with whig principles, of which fact his veto messages were speedy proof. He surpassed Monroe in zeal, though not in prolixity, in his river and harbor vetoes,[3] and outdid Jackson

[1] See his resolutions, February 27, 1837; Benton's Debates, vol. xiii, p. 567.

[2] May 26, 1836, renewed January 18, 1837; repealed December 3, 1844.

[3] June 11, 1844; Richardson, vol. iv, p. 330.

in his hostility to a bank,[1] and his hostility to a tariff bill possessing any quality of protection was equal to Calhoun's.[2] No other President has taken so narrow a view of the Constitution. But his policy had its contradictions, of which not the least conspicuous was his attitude toward Texas and his recommendation to Congress to annex Texas by a joint resolution.[3] Such a mode of acquiring territory was without precedent, yet, if Louisiana could be acquired by purchase, might not Texas be acquired by a joint resolution? Had Tyler been true to his strict construction theories, he would have proceeded in a different way. Like Jefferson he would have advised a constitutional amendment, or, like John Quincy Adams, that the states be first consulted and their approval secured. But the temptation was too great, as has usually been the case for any President who has had an opportunity to extend the boundaries of the country. Tyler, like Jefferson, for a time abandoned strict construction. His suggestion of a joint resolution was approved both by Congress [4] and the Texas convention,[5] and the new state was admitted into the Union without passing through the usual preliminary territorial stage, or even submitting a constitution, as did Missouri, that should accord with the principles of the Constitution of the United States.[6]

But Tyler's policy was approved by the democratic convention of 1844, which nominated Polk and Dallas, and the final disposition of the Texas question accorded closely with the resolution in the democratic platform, that Texas should be re-annexed to the United States at the earliest practical period. The Whigs were silent on the question. For the time being the constitutional doctrines of the two parties were interchanged much as they had been at the time of the acquisition of Louisiana, and both parties stood reversed on the question of expediency

[1] August 16, 1841; Richardson, vol. iv, p. 63; September 9, 1841; Id. p. 68.
[2] June 20, 1842; Id. p. 180; August 9, 1842; Id. p. 183.
[3] December 3, 1844; Id. p. 345.
[4] March 1, 1845.
[5] July 4, 1845; Journal of the Convention, July 4–August 28, 1845; Austin, 1845; Debates, W. F. Weeks, Reporter; Houston, 1846.
[6] March 1, 1845; Macdonald's Select Documents, p. 343.

in the Mexican war that followed. It would be difficult to harmonize the policy of conquest during Polk's administration, by which the California country was added to the United States, with the strict construction doctrines which Polk and the members of his party before him had professed.[1] The law of constitutional interpretation is usually the law of opportunism and the pro-slavery wing of the democratic party saw in the acquisition of the California country a new domain over which slavery could be extended. Yet from a constitutional point of view the United States, by reason of its sovereignty, could acquire territory either by treaty or conquest. The economic results of the Mexican war were so vast that the question of constitutionality scarcely attracted attention. It is one of the paradoxes in our history that the boldest application of loose construction theories was made by the democratic party during the administrations of Tyler and Polk. The explanation is simple: that construction, it was discovered, offered the easiest method of administering the general government so as to please the majority of the American people. National morality was at the point of degradation.

The conflicting and ominous elements in our national affairs, at this time, were plainly shown in the resolutions of state legislatures respecting the expansion of our national domain and the extension of slavery. Alabama led off boldly, in 1837, with a demand for the annexation of Texas,[2] and it was speedily followed by other southern states. The neglect or refusal of some northern communities to aid in executing the fugitive slave act of 1793, was construed by the South as a dangerous and alarming attack upon its pro-slavery rights,[3] which, above all others, it considered higher and deeper than the Constitution.[4] It considered that Congress had no power whatever over slavery,[5] though every southern state did not use the

[1] See his message on the war, May 11, 1846; Richardson, vol. iv, p. 437.
[2] Joint Resolution, December 25, 1837; January 1, 1842. Laws.
[3] Alabama Resolutions, February 14, 1843. Laws.
[4] Alabama Resolutions, January 27, 1845; Kentucky Bill of Rights, Constitution 1850, Article XIII, section 3.
[5] Virginia Resolutions, March 8, 1847. Laws.

words of the Louisiana legislature, — that the people of the South must maintain respect for their institutions, "peaceably if they can, forcibly if they must." [1] Public opinion in every slave state vindicated the Mexican war, considered the acquisition of Texas as no more than its re-annexation, and held that Congress had no power to impose conditions on slavery extension or in any way to trespass on state sovereignty.[2] Florida and South Carolina went so far as to advocate putting the South in a state of military defence.[3]

Similar but less extreme resolutions were passed by some of the northern states. They agreed that the joint occupancy of Oregon with Great Britain should cease; [4] several strongly favored the re-annexation of Texas; but their attitude toward slavery was pronounced for its restriction.[5] New York demanded that it should be forbidden in the newly acquired regions. The most liberal public sentiment toward slavery was twice expressed by the legislature of Ohio, which demanded that the ordinance of 1787 should be extended over all the territory acquired from Mexico.[6] Thus there was a solid South demanding the expansion of the country to the Pacific, and the extension of slavery over it all; and a divided North, though not on the question of expansion. The North demanded that the ordinance of 1787 and the principle of the Missouri compromise should be applied to the new acquisitions. The extremes of public opinion were expressed by the legislatures of Vermont and Virginia, the one declaring that the perpetuation of slavery was a violation of the national compact,[7] the other that any limita-

[1] Resolutions, February 20, 1837. Laws.

[2] Mississippi Resolutions, February 25, 1842; South Carolina, December 17, 1841; Tennessee, February 7, 1842. Laws.

[3] Florida Resolutions, January 13, 1849; South Carolina Resolutions, December 20, 1850. Laws.

[4] Michigan Resolutions, March 11, 1844; Illinois Resolutions, February 21, 1843, February 27, 1845. Laws.

[5] Massachusetts, April 23, 1838; Delaware, February 25, 1847; New Hampshire, July 10, 1846, January 4, 1849; New York, January 27, 1847, January 13, 1848; Pennsylvania, January 22, 1847; Vermont Acts and Resolutions, p. 23.

[6] Resolutions, February 13, 1847, February 25, 1848. Laws.

[7] Vermont Resolution, 1844. Laws.

tion of slavery or the attempt to prevent the removal of slave property to a territory was unconstitutional.[1]

The great national issue could not be mistaken; the struggle over slavery extension constitutes the chief subject of our national activity from the close of the Mexican war to the adoption of the thirteenth amendment. One phase of this question was whether slavery should be permitted in California, Oregon, and the region between Oregon and Iowa.

On the 6th of August, 1846, Stephen A. Douglas reported a bill to the House organizing the territory of Oregon, to which the committee of the whole added the anti-slavery clause from the ordinance of 1787; but the session came to a close without further action. When Congress re-assembled, Douglas reported his bill again, but the committee of the whole voted down the anti-slavery amendment. Burt, of South Carolina, then renewed the amendment,[2] inasmuch, he said, as the whole territory lay north of the Missouri compromise line. His purpose was plain enough; namely, to legalize slavery south of the line, and thus to settle a precedent for future uses. Texas was already acquired, and the southern legislatures, as we have seen, were demanding more slave territory. Burt's amendment, however, was rejected. Congress again adjourned without organizing a territorial government for Oregon. When it re-assembled, in December, 1847, it was met by Polk's message urging action,[3] and on the 29th of May the President sent a special message on the subject. Congress then set seriously to work to pass a territorial bill. The House refused to strike out the anti-slavery provision, and passed the bill on the 2d of August by a sectional vote:[4] the North against the South. It went to the Senate on the 3d, where it was amended; and, on the 10th, the anti-slavery provision was rejected, but the amendment proposed by Douglas was carried; namely, that the provision affecting slavery in the territories, embodied in the Missouri compromise,

[1] Resolutions, March 8, 1847, January 20, 1849. Laws.
[2] December 15, 1846.
[3] December 7, 1847; Richardson, vol. iv, p. 532.
[4] Yeas, 128; nays, 71.

should extend to the Pacific Ocean. On the 11th the House rejected the Douglas amendment and passed its original bill.[1] Thus the principle of the ordinance of 1787 was finally embodied in the organization of our first territory on the Pacific.

The acquisition from Mexico, commonly called the California country, at this time was the only portion of the national domain remaining unorganized. Oregon was no longer comprehended in the great issue of the hour; slavery extension and the organization of Oregon as free soil were construed by the slavocrats as an offset to California. They demanded the right to carry their slaves into any part of the new country, which they insisted should be organized as slave soil. This would compensate the South for its losses under the Missouri compromise and the recent territorial act for Oregon. With the California country open to slavery, with a stricter fugitive slave act, and with a complete, and, if necessary, enforced cessation of anti-slavery agitation, they thought the country might have peace.

These southern views were shared by many people at the North, but others there had quite opposite opinions; namely, that the Oregon question was settled, and that the principle which had excluded slavery from the territory ought to be applied to the whole country south of it. Under Mexican law this country had been free soil, and the anti-slavery party demanded that it should so continue under the laws of the United States. Congress had the right both to exclude slavery from a territory and to make its permanent exclusion a condition binding on new states. The new territories to be organized in the California country should be free soil. The fugitive slave act of 1793 was sufficiently odious without any amendment to make it more exacting. Slavery and the slave trade should be forbidden in the District of Columbia, and California should be admitted at once as a free state.

Its boundaries were as yet undefined. Just at the close of the Mexican war, when the industrial conditions of the

[1] Act of August 14, 1848; Statutes at Large, vol. ix, p. 323; 29 to 25. All negative votes from slave states.

country were more or less disturbed, the discovery of gold was announced in California. The political condition of Europe at this time compelled a multitude of families to emigrate to America, and the veterans of the Mexican war on their return home met this army of foreigners searching for homes. The news of the discovery of gold turned the faces of many toward California, and of nearly all toward the West. The ominous political problem of the extension of slavery into the territories was for a time forgotten under the excitement for gold.

By the middle of the year 1849, nearly two hundred thousand men from the older states and from Europe were in California, and its inhabitants petitioned for its admission into the Union. Congress ignored the request. No state in the Union had emerged so suddenly from the wilderness; no population in America was equally composite. On the 1st of September, 1849, its people met in convention at Monterey [1] and framed a constitution. The economic necessities of the new state excluded slavery, for if it were permitted the slaveholder would have the monopoly of the mines; and though many of the members of the Monterey convention were from slave states, and represented thousands of southern men in California, yet they fully recognized the inexpediency of introducing slavery. But all members of the convention agreed that free persons of color should be excluded, and though they did not incorporate a provision to this end in the constitution, they well knew that public opinion would be law on the subject.

Nearly half of the California country extended below the Missouri compromise line, therefore the demand of the anti-slavery party for its admission as a state alarmed the South. If admitted as a free state, even with the smallest area which was likely to be established, the region left open to slavery would not balance the free soil of the North. The region lying west and northwest of Texas was an unbroken wilderness, excepting a few old Spanish settlements and the new city of the saints which the

[1] For an account of the first constitution of California see "The Constitutional History of the American People, 1776-1850," vol. ii, chaps. x-xii.

Mormons had built near Salt Lake. If the demands of the anti-slavery North were to prevail, the slave soil of the country would extend no further west than Texas, nor further north than the line of 36° 30′. Slavery would thus be hedged in and in course of ultimate extinction. At this time, 1848, the thirty states of the Union were equally divided between free soil and slave soil, but the House of Representatives consisted of one hundred and thirty-nine members from free states and ninety-one from slave. The population of the free states was nearly thirteen millions,[1] that of the slave states nearly nine millions.[2] Nearly a million and a half of immigrants had arrived in the country during the preceding eight years,[3] and most of them had settled in the free states. Unaccustomed to African slavery at home, they avoided it on coming to America, and they knew also very well that they were not welcome in any southern state except Louisiana.[4]

Hostility to foreign immigration was characteristic of the South at this time. It was freely expressed on every side, but nowhere more vigorously than in the constitutional conventions. The European immigrant came to America to work for a living and naturally sought a home where to labor was not under a social stigma. Slavery was eulogized by many of its defenders at the South as its best protection against the foreigner. The effect of this hostility to free labor turned the tide into the free states and developed and strengthened all their institutions and industries.

The tremendous significance of this accession to the number of laborers, who quickly imbibed the political notions of the North, may best be comprehended after an examination of the wealth and productivity of the North at this time. The evidence was the census of 1840, and it was first used to emphasize the contrast between free

[1] In 1850, 13,599,488. [2] In 1850, 9,663,997.

[3] The number from 1841 to 1850 was 1,713,251.

[4] In Louisiana the percentage of foreign born was 13.18; in 1850, in California, 23.55; in Wisconsin, 36.18, Kentucky, 3.2; Tennessee, .56; Massachusetts, 16.49; Pennsylvania, 13.12; Census of 1890, part 1, Population, pp. lxx–lxxiv.

states and slave states by a member of the Kentucky convention of 1849, assembled at Frankfort in October of that year to frame a new constitution for the commonwealth.[1] A minority in the convention had favored a policy of gradual emancipation for the state, and it was as an argument for the restriction of slavery that the facts from the census were cited by a member who represented the counties of Knox and Harland.

The tobacco, the rice, the cotton, and sugar exported from the South to foreign countries in one year amounted to nearly seventy-five millions ($74,866,310), but the agricultural products of the state of New York alone were of the value of one hundred and eight millions ($108,275,281). The slave states manufactured articles to the value of forty-two millions ($42,178,184); the free states, to nearly five times this amount ($197,658,400). The aggregate earnings of the slave states were four hundred millions ($403,429,718), but of the free states, more than six hundred and fifty millions ($658,705,108). The income of the state of New York alone was greater by over four millions than the aggregate income of Alabama, Georgia, Mississippi, Louisiana, and the Carolinas. One county in Massachusetts, the county of Essex, with a population of only ninety-five thousand, produced as much as the entire state of South Carolina with a population of nearly five hundred and fifty thousand.

More striking was the contrast in educational privileges. In the primary schools on slave soil, two hundred thousand (201,085) pupils were in attendance; but in the free states such schools were attended by more than eight times as many children (1,626,028). The primary schools of Ohio alone enrolled nearly eighteen thousand more pupils than all the slave states. The high schools of the South were attended by thirty-six thousand (35,935) scholars; those of the North by over four hundred and thirty thousand (432,388). The attendance in the high schools of the smallest free state, Rhode Island, exceeded that in the largest slave state, Virginia, by a thousand pupils.

[1] Debates and Proceedings of the Convention for the Revision of the Constitution of Kentucky, 1849, pp. 870, *et seq.*

The high schools of Massachusetts enrolled nearly four times as many students as were enrolled in such schools in all the slave states. Taking the schools and colleges of the North all together, the attendance was more than two millions of pupils (2,213,444). At the South it was less than one-third of a million (301,172). At the South one person out of every ten of the white population could neither read nor write; in the free states the proportion was one to one hundred and fifty-six.

The supporters of slavery in the Kentucky convention did not deny the accuracy of the census, but did deny the truth of the deductions which anti-slavery men drew from them.[1] The contrast between the North and South which the census of 1840 disclosed, they claimed, was not due to slavery. They preferred an agricultural to a manufacturing condition; they did not want to live the life of the North; they were satisfied with southern political economy, and they demanded that they should be permitted to establish it in any territory in the United States. If the relative strength of the two sections of the country was accurately shown by the census of 1840,—and nearly nine years had now passed,—and if the demands of the North and those of the South as to the extension of slavery could not now in some way be compromised, the days of the Union seemed numbered. In case a compromise was made, it must, in order to prove stable, be founded upon a true economic basis.

When Congress met in 1849, it was commonly understood that a compromise of some kind would be attempted. The last serious attempt at excluding slavery from the California country had failed. It had been made by David Wilmot, of Pennsylvania, on the 8th of August, 1846, and had been offered as a proviso to a bill appropriating $2,000,000 to be expended in the peace negotiations with Mexico.[2] The proviso excluded slavery forever from all soil that might be acquired and was carried in the House, in committee of the whole, by a vote of eighty-three to sixty-four. It would probably also have carried in the

[1] Kentucky Debates, 1849, p. 877.
[2] See Polk's Message, August 8, 1846; Richardson, vol. iv, p. 459.

Senate had not John Davis, of Massachusetts, persisted in delivering an untimely speech, in the midst of which Congress adjourned, and the opportunity for carrying the proviso was forever gone. All efforts to revive it in the next Congress failed. The pro-slavery men considered it a plain violation of the Constitution, and the Whigs as a party inclined to the same view. In place of so radical a measure, the pro-slavery party, of whom Calhoun was the leader, demanded that the Constitution and laws of the United States applicable to a territory should be extended over the new acquisition.[1] This would have made the new region slave soil.

On the 29th of January, 1850, Henry Clay came forward in the Senate with eight resolutions which, he said, covered all points of the question, and would amicably adjust upon a fair and equitable basis all the controversies arising out of the institution of slavery. These resolutions were, in brief: to admit California as a free state; to organize the territories of Utah and New Mexico without reference to slavery; to include a portion of the state of Texas within the boundaries of New Mexico, and in compensation to assume the public debt of Texas contracted before its annexation; to abolish the slave trade, but not slavery, within the District of Columbia; to enact a more effective fugitive slave law, but to leave the trade in slaves between the slave-holding states wholly to their control.[2] Clay supported his resolutions in a speech which he was not unwilling should be considered the greatest of his life. To this ambitious scheme of compromise the support of Webster and some of the lesser Whig leaders was first secured. Both Houses were willing to concede its principles, and it seemed destined to speedy adoption.

The resolutions were reported in one bill in May, but were no sooner reported than the elements of discord in the bill were recognized as fatal to its passage, and after a debate running through the summer session, its

[1] Calhoun's Works, vol. iv, pp. 346, 498.
[2] Benton's Debates, vol. xvi, p. 386.

propositions were taken up and passed separately.[1] Every prominent member of Congress spoke on the resolutions, but their constitutional aspects were best interpreted in three great speeches, — those of Calhoun,[2] Webster,[3] and Seward.[4]

Calhoun began by saying that the continued agitation of the subject of slavery would end in disunion. The United States was a slave-holding power, its Constitution a pro-slavery instrument. It recognized the right of property in slaves, and on that right lay the foundation of the civil organization of the South. Every denial of that right, therefore, tended to destroy the very purpose for which the Union had been organized. The South had an equal right with the North to all territories. To deny that equal right could mean nothing less than disunion. Hitherto the balance of power had been maintained through the admission of an equal number of free and slave states, but now by the admission of California that equilibrium had been destroyed. So aggressive had been the anti-slavery North, that the South was excluded from all but about one-fourth of the vast area which had been acquired since the formation of the compact between the states. The policy of tariff protection had enriched the North at the expense of the South, and had attracted immigration from all quarters of the world. For these reasons the North had acquired a preponderance in every department of the government. The ordinances of 1787 and the Missouri compromise had excluded the South from its portion of the great West; otherwise the contrasts shown by the census of 1840 could never have been possible. By concentrating all the power of the federal system in itself, the government of the United States had become entirely changed from its original character. It now claimed the right to decide in the last resort as to the extent of its powers, wholly ignoring the sovereign rights of the states. To all this discrimination against

[1] The Texas bill, the territory of New Mexico, the admission of California, the Utah bill, September 9th; the fugitive slave law, September 16th; the slave trade in the District of Columbia, September 20, 1850; Statutes at Large, vol. ix, pp. 446–467.

[2] March 4, 1850. [3] March 7, 1850. [4] March 11, 1850.

the South was to be added the hostile sentiment of powerful organizations at the North which were demanding the abolition of slavery. Their demands since 1835 had become more and more exacting, until they practically dominated the general government. The cords which held the two sections of the Union together were snapping one by one. The Constitution had been violated; the Union was in peril of dissolution, and Clay's compromise could not save it. Nothing could save it but a return to the original meaning of the Constitution as a compact between sovereign states, under which all possessed equal rights; therefore Calhoun opposed the compromise.[1] He spoke for slavocracy and proclaimed its ultimatum.

Three days later Webster replied in his famous 7th of March speech,[2] an appeal for the preservation of the Union. He sympathized with the South, fully agreeing that it had many and serious grievances against the North, chief of which were northern violations of the fugitive slave act. The institution of slavery was a recognized part of the constitutional organization of the country and should be respected. He admitted that the Mexican war had been prosecuted for the sole purpose of adding territory over which slavery should be extended, and as the acquisition was of a region which lay in a warm climate, the South naturally expected that it would become slave soil. Whether the region should be free or slave, he believed, was fixed by an irrevocable law beyond the power of Congress. Nature herself would regulate the extension of slavery, and against her laws he believed it folly to contend; therefore the fate of slavery in the California country should be left to the laws of climate. He did not fear that slavery could be maintained against natural law.

Though opposed to slavery extension, he considered the United States pledged to create just such states out of Texas as its people might demand respecting slavery. His interpretation of the law of nature in the California country seems now quixotic, but he believed that Califor-

[1] Calhoun's Speech in Johnston's American Orations, p. 246.
[2] Works, vol. v, p. 324.

nia and New Mexico were destined to be free soil "by the arrangement of things ordained by the Power above us." On the principle of the Wilmot proviso he cast every aspersion. He believed that Clay's compromise plainly contained a working principle which would preserve the Union, and for this reason he supported it. But the burden of his speech was a defence of the South in its complaints against the North.

While the debate was running on in Congress, the state legislatures were passing elaborate resolutions. The northern, favoring the admission of California as a free state, demanded the exclusion of slavery from the new territories, and the abolition of the slave trade in the District of Columbia; the southern, emphasizing state sovereignty, denied the power of Congress to legislate as to slavery; attacked the principle of the Wilmot proviso, and in substance supported Calhoun's opinion of the compromise.[1] The South was calling for a convention of slave-holding states to consider the defence of its rights, and Calhoun was secretly arranging that one should assemble at Nashville early in June. Clay and Webster had spoken for the compromise, Calhoun had spoken against it, but the faces of all three were set toward the past.

The great speech against the compromise was Seward's, delivered four days after Webster's. Seward realized that the period for compromises had passed. The title which he gave to his speech, "California, the Union, and Freedom," indicated its scope and purpose. He found little in the proposed compromise that he could approve. California, he said, was already a state, and he answered every objection which had been made to its admission. Looking into the future, he foretold with remarkable accuracy the growth of the nation for the next half century. It would increase from twenty to eighty millions, and the faces of all would be set toward the West. There lay the future of the nation. The balance of

[1] For a résumé of these resolutions, see "The Constitutional History of the American People, 1776–1850," vol. i, pp. 337–340. Typical resolutions with those of Mississippi, March 5 and 6, 1850; of New York, January 16, 1850.

political power would be in its keeping. The organization of civil government in the California country would, therefore, affect the destiny of millions yet unborn.

The speeches of Webster and Clay were cast in the same political mould, but those by Calhoun and Seward had nothing in common. Calhoun spoke of the compact, of state sovereignty, and of slavery as a permanent national institution. Seward spoke of the nation and universal freedom, and of the permanent restriction of slavery in the slave-holding states. Congress, he said, had power to exclude it from the territories, and in so doing would carry out the principles of the founders of the government. New states would cling to a closer alliance than would the older ones, therefore Congress should make the new states free. Calhoun had appealed to the Constitution as the final and only test of legislation, but Seward boldly announced that there was a law higher than the Constitution which regulated the authority of the American people over their domain and devoted it to the noblest purpose. That domain, constituting no inconsiderable portion of the common heritage of mankind, had been bestowed upon them by the Creator of the universe. They were stewards, and must so discharge their trust as to secure happiness in the highest attainable degree, which was to be won not by the extension of slavery but by the extension of freedom throughout the national domain.

Is it strange that when Seward appealed to the "higher law," Calhoun declared that a man who could utter such a doctrine was unfit to be a member of the Senate?

The debate on the compromise of 1850 brought to light how deeply seated among the different sections of the American people were the doctrines of 1798, the principles of the Missouri compromise of 1820, and the antagonistic principles discussed at the time of the South Carolina ordinance of nullification of 1832. The debate brought plainly to view the seam running through our civil institutions.

The thirty years following the Missouri compromise form a period whose political agitations largely grew out of that compromise. Slavery had become an economic

factor in America, and during these thirty years slave labor was profitable — as measured by monetary values. The great migration into the West began, and the frontier was a movable line. Had slavery been unproductive, as production was measured by the standards of that time, gradual emancipation must slowly have undermined the institution. But America was still in the agricultural stage, and agricultural methods were rude. The virgin soil had not yet been exhausted by slave labor; there seemed to be an endless supply of new soil in the West, and slavery, as most men thought, was a permanent and inseparable element in the economic life of the country.

Because of the prevailing notions of labor and economy, slavery found aggressive supporters. The Constitution and the laws were evoked because the interests of slavery were the interests of property. The human element was wholly subordinated to the *jus rerum*. Sifted of verbiage and legal technicalities, the numberless speeches, in and out of legislative halls, in defence of slavery, were merely a defence of the rights of property. At no time preceding this period was there, anywhere in the world, so ardent a defence of slavery by civilized men as was heard during these thirty years in America. And the paradox seems inexplicable that statesmen of the acumen of Calhoun and Webster should spend the best years of their lives in defence of slavery. Unquestionably they had the law of the land on their side. Ours was a slave-holding republic: a political aggregation in itself a paradox.

The long debate of slavery, from the Missouri compromise to the compromise of 1850, came, as it may be said, naturally in the evolution of government in America. Every period of prolonged, serious, and critical debate precedes, in every country, a political revolution. Viewed as a question in government, slavery was bound to divide the country, economically and politically, and this the statesmen of the period clearly foresaw. The advocates and the opponents of slavery agreed touching one thing, and only one thing, — that the agitation of the issues of slavery meant disunion; yet everybody was agitated, more or less, over slavery.

The sovereignty of the federal government was involved

in the debate, as it was later involved in the consequences of the agitation.

A compromise opened and a compromise closed the period. But the startling fact is the indifference of events to the plans of the debaters and the compromises of the law-makers. A mighty economic change was transforming the country. Because America was the land in which labor must be honorable, free, and productive, slavery was doomed to extinction. Slave labor and free labor have never gone on side by side peaceably. Both laborers must be slaves or both must be free men. The law which was annulling all other laws in America was that law of economy which proclaims human labor free.

We must not be misled by the apparent and overlook the real forces which were shaping the history of America during these years. It was the open, untilled West, the accessible mines, the economic opportunity in America, which determined its political because it determined its economic history. Nullification, extension of slavery, state sovereignty, were passing phases in the evolution of popular government in America. Removed from us as the period is by scarcely two generations, it seems as distant as the revolution. A false economy prevailed, and consequently a false conception of political ideals. Statesmen might deliver 7th of March speeches, but the fate of the country was in the hands of the plain people, the toilers on the farms. The rights of free labor were yet to correct the faults in the Constitution.

CHAPTER IX

SLAVERY EXTENSION

At the time the last of the compromise acts of 1850 was passed, it is doubtful whether there were a dozen white families living in the wilderness between the present boundaries of Minnesota, Iowa, Missouri, and the Mormon settlements at Salt Lake; but within two years immigration set in toward this region, and settlements were made along the Kansas and Nebraska rivers. At the session of Congress of 1851–1852, several petitions were presented for the organization of a territory west of Iowa, but it was not until the 2d of February, 1853, that a bill to organize a territory under the name of Nebraska was reported. It passed the House on the 10th, was referred to the committee on territories in the Senate on the following day, and was reported without amendment by Stephen A. Douglas on the 17th; but the Senate gave the subject no further attention during the session. During the brief debate, the purpose of the pro-slavery party was disclosed by Senator Atchison, of Missouri, — namely, to oppose the organization of the territory unless the restrictions of slavery by the Missouri compromise were removed.

President Pierce in his inaugural [1] pronounced the compromise measures of 1850 strictly constitutional, and declared himself bound to carry them into effect; but this policy could not be carried out if the purpose of Atchison and his supporters was to prevail. Much was said in the thirty-third Congress, which assembled December 5, 1853, of the prospective territory of Nebraska, and a bill for its organization was reported by Senator Douglas on the 4th of January, 1854. The accompanying report of the com-

[1] March 4, 1853; Richardson, vol. v, p. 195.

mittee on territories reaffirmed the compromise measures of 1850, and rested the bill upon three propositions:[1] that the question of slavery in the territories and in new states formed from them should be left to the decision of the people residing in them; that all cases involving the question of personal freedom — that is, the title to slaves — should be referred to the local judicial tribunal, with right of appeal to the supreme court of the United States; and that the fugitive slave act should be faithfully executed.

Douglas proposed, as an amendment to the bill, that the Missouri restriction on slavery should be declared inoperative and void; but this was lost. However, as a compensation, the Senate struck out the passage in the bill that the Missouri restriction was superseded by the principle of the compromise of 1850; but this did not satisfy Mr. Douglas, who, on the 15th of February, succeeded in substituting his amendment, that the Missouri restriction was inconsistent with the compromise of 1850 and, therefore, void; "it being the true purpose of the new territorial bill neither to legislate slavery into a territory or state, nor to exclude it, but to leave the people of either free to regulate their domestic institutions in their own way, subject only to the Constitution of the United States." Senator Chase, of Ohio, wished to amend further by adding that the people of a territory, if they saw fit, might prohibit slavery, but this was rejected. Instead of this plain provision the Senate added a proviso that the bill should not be construed as putting in force any law that existed before the 6th of March, 1820, either establishing or abolishing slavery. At Senator Clayton's suggestion, immigrants from Europe who had declared their intention to become citizens should not be allowed to vote unless otherwise qualified. Chase wished to amend the bill further so as to allow the people of a territory to choose their own governor, but this application of "squatter sovereignty" was defeated. The principal speech against the bill was delivered by Senator Seward, who detected in the measure a device for establishing

[1] Senate reports, 33d Congress, First Session, vol. i, No. XV.

slavery in Nebraska; but his objections were not sustained and the bill passed the Senate as a pro-slavery measure.[1]

In the House a separate territorial bill for Nebraska had been introduced on the 22d of December, but on the 31st of January, 1854, the committee on territories reported a bill to organize both Nebraska and Kansas in one act. It was substantially the Douglas bill. An ineffective attempt was made to incorporate the doctrine of "squatter sovereignty" in a provision authorizing the inhabitants to determine the question of slavery for themselves. On the 2d of May the bill was finally passed,[2] the majority in its favor being from slave states. The Senate took it up practically as a substitute for its own measure. The bill passed on the 24th and was approved by the President.[3] It extended the fugitive slave act over the territory; declared the Missouri compromise inconsistent with the principle of non-intervention by Congress with slavery in the states and territories as recognized by the compromise of 1850, and left the question of slavery to be settled by the inhabitants in their own way.

The bill was arraigned in an open letter by the Independent Democrats[4] as a gross violation of the recent compromise and of the earlier one of 1820. The signers of the expostulation held that the constitutionality of slavery restriction embodied in the Missouri compromise was established not only by President Monroe and his cabinet, but also by the acquiescence of the American people for nearly thirty-five years. The consequence of the Kansas-Nebraska act could not be measured. It re-opened the whole question of slavery restriction; its prospective economic effects were more alarming. Its first operation, as it permitted slavery in Nebraska, would cut off the free states of the Pacific from those of the Atlantic. It would defraud untold millions of Americans and of immigrants from securing homes in free soil. Free men would not work by the side of slaves. The

[1] March 3, 1854. [2] 113 to 100.
[3] May 30, 1854; Statutes at Large, vol. x, p. 277.
[4] Signed by S. P. Chase, Charles Sumner, J. R. Giddings, Edward Wade, Gerrett Smith, Alexander DeWitt; January 19, 1854; Congressional Globe, 33d Congress, First Session, part 1, pp. 281–282.

vast territory to be organized would extend the domain of slavery northward; it would imperil the Union.

The "squatter-sovereignty" act of 1854 indicated the slight respect which the democratic party had for any interpretation of the Constitution, or any law which tended to restrict slavery. In vain did Senator Chase, of Ohio, attempt to amend the act by adding that the people of the territory might prohibit slavery through their representatives; the dominant party refused any modification of the new act which might be construed as either establishing or abolishing slavery: that should be left with the people of the territory. Fair as this seemed on its face, the act of 1854 was practically a pro-slavery measure. The revelation of its true character depended upon its execution, and that was in the hands of pro-slavery men. The immediate effect of the act was to stimulate immigration to Kansas. Two streams of population poured in; one from the North, hostile to slavery; the other from the South, determined to establish it in the new region. Each party attempted to secure a constitution for Kansas, the one anti-slavery, the other pro-slavery. The immediate result was civil war in Kansas for nearly two years. The Topeka constitution,[1] which made the territory free soil, and the government instituted under this constitution, were not recognized by the President. The Lecompton constitution,[2] which was pro-slavery, was so ingeniously submitted to the people that it was bound to be adopted whether free state men voted for or against it. Like the constitution of Kentucky of 1849, it declared the right of property (meaning particularly slave property) to be above and higher than any constitutional sanction, but went further than the Kentucky or any other state constitution, and asserted that the right of an owner of slaves to them and their increase was as inviolable as the right of the owner of any property whatever. This declaration was the last of its kind; never again was a pro-slavery clause to be incorporated into an American constitution. The Lecompton constitution was also the last to define a state as "free, independent, and sovereign." Free

[1] December 15, 1855. [2] December 21, 1858.

negroes were forbidden to enter the state. The ratification of this constitution was wholly fraudulent, for the vote stood twenty-four for the constitution, with slavery; one hundred and thirty-eight, without slavery; and ten thousand two hundred and twenty-six, against the constitution in any form.[1]

President Buchanan sent the constitution to Congress on the 2d of February, 1858,[2] with a special message declaring that it had been made according to every principle of constitutional law, and at the same time pronouncing the Topeka constitution and the legislature existing under it a revolutionary government. This was not the President's first praise of the Lecompton instrument, for he had dilated on its excellencies in his annual message [3] of the preceding year. His support of it was due to his conviction that it conformed to just principles of government. What these principles were was made known two days after the inauguration in the decision of the supreme court in the Dred Scott case, an impending dicision to which the President referred in his inaugural. Whether he had knowledge of the forthcoming decision is not known.

Scott was a slave of one Dr. Emerson, a citizen of Missouri, who, in the course of his military duties had removed to Rock Island in Illinois, and later to Fort Snelling, which at the time was in the territory of Wisconsin. While at Fort Snelling, Scott, with his master's consent, had married a negro woman who also had been brought from Missouri. Two children were born to them in Wisconsin. In 1850 Emerson was again living in Missouri, whither he had brought Scott and his family. The negro brought suit for the freedom of himself and family on the ground that they had lived in Illinois and Wisconsin, which were free states. The St. Louis local court sustained his suit, deciding that he and his family were free persons.[4] Emerson appealed the case to the state supreme court, which promptly reversed the decision.

[1] It was claimed that it was ratified by 6,226 votes to 589.
[2] Richardson, vol. v, p. 471.
[3] December 8, 1857; Id. pp. 452–454.
[4] 15 Missouri, 581.

Not long after, Scott and his family were sold to one Sandford, a citizen of New York, and Scott again brought suit for his freedom; this time in the United States circuit court at St. Louis, which pronounced them the property of Sandford.[1] They appealed the case to the supreme court of the United States, before which the case was twice argued; first, in the spring of 1856, when, on account of the approaching presidential election, the opinion of the court was withheld; and the second time in December, 1857, when the issue was enlarged to include the question whether the Constitution empowered Congress to exclude slavery from the territories. This involved the constitutionality of the ordinance of 1787, of the Missouri compromise of 1820, and of all acts resting upon them.

The court consisted of nine judges, five of whom were from slave, and four from free, states. Seven were Democrats. The majority of them agreed that the decision of the Missouri circuit court should be sustained; therefore Scott and his family were slaves. But not content to leave the matter here, the court undertook to give peace to the country and to settle the critical question in dispute. The chief-justice, Taney, determined to give an opinion covering all the issues in the case. Each associate justice also wrote an opinion. Seven of them[2] agreed with Taney, though for different reasons, that the court had no jurisdiction in the case, but Curtis and McLean dissented wholly from him. Slaves, the court held, were property, and had never been citizens in contemplation of law since the organization of the general government; therefore all laws prohibiting slavery were unconstitutional. The mass of legislation upon which the governments of the old Northwest rested, that is, the ordinance of 1787; the Missouri compromise; the Oregon bill; the constitutions of the six states west of Pennsylvania,[3] in so far as they forbade slavery; and all laws in restriction of it made under them, and all territorial acts in restraint of slavery, were unconstitutional. Congress could protect or extend slavery, but could not limit or prohibit it.

[1] May, 1854.
[2] Campbell, Catron, Daniel, Grier, Nelson, Wayne, Clifford.
[3] Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa.

The states were sovereign and the United States were not for all purposes a nation.

In a prolix opinion which reviewed the history of the legal status of the negro, the chief-justice excluded the African race from all participation in the privileges of free men.[1]

Mr. Justice Curtis delivered a dissenting opinion. In five of the thirteen original states, said he, persons of color had been electors and had participated in ordaining and establishing the Constitution. It had not been made exclusively by the white race nor for them. They were entitled to all the rights and privileges of free men; with the substance of which opinion McLean agreed. No decision of the court throughout its history has provoked so widespread public interest. The victory was for state sovereignty and slavery, and the democratic party and all friends of slavery accepted it as a final settlement of the whole matter. The President applied it in his interpretation of affairs in Kansas and Nebraska. He knew, as did thousands of other American citizens, that twenty-seven of the thirty-one state constitutions then in force denied the right of citizenship to free persons of color. The anti-slavery party promptly pronounced the court's discussion of slavery extension mere *obiter dicta*, and that in attempting to settle the slavery question the court was interfering in political matters.

Public opinion in the North was well exemplified in the utterances of Senator Douglas and Mr. Lincoln. Douglas, devoted to what he called "the great principle of popular sovereignty and self-government," boldly claimed that he found that the principle sustained the decision. But if Congress could not keep slavery out of a territory, how could the people of a territory keep it out? A *non sequitur* which Douglas ignored.[2] Far different was Mr. Lincoln's comment on the decision. It was made, said he, by a divided court, whose decisions on constitutional questions, "when fully settled, should control not only the particular cases decided but the general policy of the

[1] Scott *v.* Sandford, 19 Howard, 393 (1857).
[2] Nicolay and Hay's Lincoln, vol. ii, p. 84.

country, subject only to be disturbed by amendments to the Constitution. More than this would be revolutionary." But Lincoln did not hesitate to pronounce the decision erroneous. The court had often overruled its own decisions, and he declared that the party to which he belonged would do all it could to have it overrule this one. This party — the republican — would offer no resistance to the decision, but would labor so to change public sentiment as to compel a new decision.[1] Instead of forever settling the slavery issue, the Dred Scott decision broke up old parties, dividing them anew into one, the democratic, favoring slavery extension, and into another, the republican, demanding its exclusion from the territories.

On the 18th of May, 1860, the republican party, in national convention at Chicago, nominated Abraham Lincoln and Hannibal Hamlin for President and Vice-president on a platform which proclaimed the new dogma, that the Constitution of its own accord carried slavery into the territories, — a dangerous political heresy. The platform asserted that the normal condition of all the territories of the United States was one of freedom. The democratic party was a house divided against itself. The followers of Douglas nominated him for the presidency at Baltimore in June,[2] on a platform declaring that the party would abide by the decision of the supreme court; but the extreme wing of the party, assembled also at Baltimore in convention, nominated John C. Breckenridge and Joseph Lane, on an out and out slavery extension platform; the two most important resolutions of which declared it to be the duty of the federal government to protect the property and rights of all persons in the territories; that under the right of state sovereignty, the people in forming a state constitution were free to adopt or to prohibit slavery, and that a state thus organized ought to be admitted, whatever its constitution might provide respecting slavery.

The election of 1860 was final and startling proof of

[1] Speech of June 26, 1857; Works, vol. i, p. 228.

[2] Herschel V. Johnson was later put on the ticket with Douglas, by the executive committee, for vice-president.

sectionalism in the country. Lincoln and Hamlin were both northern men; the one from Illinois, the other from Maine, though Lincoln was a native of Kentucky. They received no electoral votes and but few popular votes from any slave-holding state. Douglas and Johnson carried New Jersey and one slave state, Missouri. Breckenridge carried eleven slave states, but not one free state. Three slave states supported Bell and Everett, the nominees of the Union party.[1] So all the slave states voted against Lincoln and all save one of the free states voted for him. Long before his nomination, a secession program had been drawn up at the South, and his election was declared a sufficient cause for dissolving the Union. Threats of secession had at times been uttered North and South, from the day of the inauguration of the government down to the South Carolina ordinance of nullification. They had been freely spoken during the debate on the compromise of 1850, and had colored the speech and action of radical pro-slavery men since that time.

The working elements of secession were state sovereignty, free trade, slavery extension, and confederacy. In every great struggle in which either of these elements had hitherto come to the front as a national issue, save in the repeal of the compromise of 1850 by the Kansas-Nebraska act, the adherents to slavery had lost; but all that they had lost seemed now regained by the decision in the Dred Scott case. From the time when the legislature of Alabama, in 1837, advocated the annexation of Texas, to which most of the southern states responded, the South had spoken in a military tone. During Pierce's administration the South had been gradually put into a condition of military defence, largely through the energy of the secretary of war, Jefferson Davis. Ultra-slavocrats, like William L. Yancey, had long been demanding "immediate, absolute, and eternal separation."[2] This was the south-

[1] Virginia, Kentucky, and Tennessee. The Union party's platform was "The Constitution and the laws"; a party of *statu quo* pacification.

[2] See his speech delivered in the Democratic State Convention of the State of Alabama, held at Montgomery, January 11–14, 1860. Pamphlet, Montgomery, Advertiser Book and Steam House Job Print, 1860, p. 31.

ern program, if Lincoln should be elected. The issue was plainly put by the governor of North Carolina in October, 1860,[1] when he said that Lincoln's election on a platform demanding the exclusion of slavery from the territories imperilled the institution throughout the South.

Down to 1815 the ultras among the state sovereignty party complained that the government of the United States was consolidated. Then, until 1833, the complaint ran that the government had adopted a protective policy destructive to southern interests. From this time until 1860 the federal government was accused of seeking to exclude slavery from new soil. But at the bottom of all these complaints were the radical and permanent differences between the two social and industrial systems existing in the country. These differences were accurately portrayed in the "Declaration of the Causes of Secession," issued by South Carolina on the 20th of November, 1860.[2] The convention which passed this ordinance [3] also issued an "Address to the People of South Carolina" [4] and another to the "People of the Slave-Holding States." The declaration and the address cited as precedents for secession, the Declaration of Independence, the Articles of Confederation and the Constitution of the United States. The compact between the states, so ran the declaration, had been broken by the northern states, and particularly by their enactment of personal liberty bills, and by their long continued hostility to slavery. As the result of this agitation, a geographical line had been drawn across the Union; and the states north of the line had united in the election of a President who had declared that "the government could not endure permanently half slave and half free, and that the public mind must rest in the belief that slavery was in the course of ultimate extinction." The guarantees of the Constitution no longer existed. The equal rights of the states were lost; there-

[1] Gov. John W. Ellis to Gov. W. H. Gist of South Carolina, October 18, 1860; Nicolay and Hay's Lincoln, vol. ii, p. 307.

[2] Journal of the Convention of the People of South Carolina held in 1860, 1861, and 1862, together with the Ordinances, Reports, Resolutions, etc. Columbus, South Carolina, 1862, p. 873.

[3] Id. p. 4. [4] Id. p. 467.

fore, South Carolina resumed her position among the nations of the world as a separate and independent state.

But the irremediable differences between the two sections were industrial as well as political, as was clearly stated in the South Carolina address: "The union of the Constitution was a union of slave-holding states. It rests on slavery by prescribing a representation in Congress for three-fifths of our slaves. There is nothing in the proceedings of the convention which formed the Constitution to show that the South would have formed any other union; and still less, that they would have formed a union with more powerful non-slave-holding states having a majority in both branches of the legislature of the government. They were guilty of no such folly. Time and the progress of things have totally altered the relations between the northern and southern states since the Union was established. That identity of feelings, interest, and institutions which once existed has gone. They are now divided between agricultural, manufacturing, and commercial states; between slave-holding and non-slave-holding states. Their institutions and industrial pursuits have made them totally different peoples. That equality in the government between the two sections of the Union which once existed no longer exists. We have but imitated the policy of the Fathers in dissolving the Union with non-slave-holding confederacies and seeking a confederation with slave-holding states.

"Experience has proved that slave-holding states cannot be safe in subjection to non-slave-holding states. The fairest portions of the world elsewhere have been turned into a wilderness, and the most civilized and prosperous communities have been impoverished and ruined by anti-slavery fanaticism. The people of the North have not left us in doubt as to their design and policy. United as a section in the late presidential election, they have elected as an exponent of their policy one who has openly declared that the states of the United States must be free, not slave. It is true that amidst those who aided his election there are various shades of anti-slavery hostility, but if African slavery in the southern states be the evil their political campaign affirms it to be, the

requisites of an inexorable logic must lead them to emancipation. If it is right to preclude or abolish slavery in a territory, why should it be allowed to remain in the states? The one is not at all more constitutional than the other, according to the decisions of the supreme court of the United States. And when it is considered that the northern states will soon have the power to make that court what they please, and that the Constitution has never been any barrier whatever to their exercise of power, what check can there be in the unrestrained counsel of the North to emancipation?"

Separation from the northern states, it was urged, invaded none of their rights or interests. The Constitution of the United States had been made and adopted by independent states, each acting for itself. South Carolina, "acting in her sovereign capacity," now thought proper to secede from the Union, assured that she had not parted with her sovereignty in adopting the Constitution. Circumstances beyond her control, it was said, had placed her "in the van of the great controversy between the northern and southern states." She asked her sister slave-holding states to be one with her in a great slave-holding Confederacy, stretching its arms over a territory larger than that possessed by any power in Europe; with a population four times greater than that of the whole United States when they achieved their independence; with common institutions to defend and with productions which made its existence more important to the world than that of any other people.[1]

The spread of secession was rapid. By the 5th of February, 1861, six slave states had joined South Carolina and had adopted similar ordinances of secession.[2] On the day before Texas seceded, a convention of these states assembled at Montgomery, Alabama, and adopted a provisional constitution for the Confederate States of America.[3] On the 11th of March, just a week after the

[1] Journal of the Convention of the People of South Carolina held in 1860, 1861, and 1862, together with the Ordinances, Reports, Resolutions, etc. Columbus, South Carolina, 1862, pp. 472–475.

[2] Alabama, January 4; Mississippi, January 9; Florida, January 10; Georgia, January 19; Louisiana, January 26; Texas, February 5, 1861. For these ordinances see the Journals of the Conventions.

[3] February 9, 1861.

inauguration of President Lincoln, a permanent constitution was adopted, and, on the 18th, Jefferson Davis, lately a United States senator from Mississippi, was inaugurated President of the Confederacy, and Alexander H. Stephens, Vice-president. The secessionists attempted to bring the remaining slave-holding states into the Confederacy, and were successful in Virginia [1] and North Carolina,[2] though probably a majority of the people in both states were opposed to the movement, and they were likewise successful in Arkansas [3] and Tennessee, though the people of the eastern or mountainous portion of Tennessee refused allegiance to the Confederacy and remained loyal to the Union. The Confederate government was removed to Richmond, and every effort was made to secure the co-operation of the border slave states. Though formally admitted [4] into the Confederacy, the border states did not secede from the Union.[5] But in Kentucky and Missouri, as in Tennessee, there was a powerful and, at times, a dominating sentiment favorable to the Confederacy.

The constitution of the Confederacy was modelled after that of the United States, but varied from it in important particulars. Its preamble declared that the Constitution was ordained and established by the people of the Confederate states, "each state acting in its sovereign and independent character." The importation of negroes was forbidden except from the United States.[6] The term of the President and Vice-president was six years, and the President was not re-eligible.[7] In place of the figurative language "all other persons" in the national Constitution describing those in bondage, the constitution of the Con-

[1] Its ordinance of secession passed April 17, 1861.
[2] May 20, 1861; Journal of the Convention, pp. 13–16.
[3] May 6, 1861.
[4] The acts admitting these states into the Confederacy are in Statutes at Large of the Provisional Government of the Confederate States of America; for Tennessee, May 17, 1861, p. 19; for Kentucky, December 10, 1861, p. 222; for Missouri, November 28, 1861, p. 221; for Arkansas, May 21, 1861, p. 120.
[5] Except Delaware and Maryland; see its resolutions relating to the accession of Maryland, December 21, 1861; Confederate Statutes at Large, p. 281.
[6] Article XII, section 1, clause 1.
[7] Article I, section 9, clause 1.

federacy used the word "slaves." The foundation of the new government was slavery and state sovereignty, but the constitution contained the apparent contradiction that no state could enter into any treaty, alliance, or confederation with another state.[1]

The earliest exposition of the new government was made by its Vice-president in a public address at Savannah, in March, 1861, in which he pointed out the provisions in its constitution superior to those of the United States. According to Stephens, these improvements were the "removal of the old thorn of the tariff"; the inability of the Confederate Congress to make internal improvements at the expense of the Confederacy; the privilege of cabinet ministers and heads of departments to participate in the debates of the two Houses;[2] the longer term for the President, and "the removal of the rock upon which the old Union had split," namely, agitation against African slavery. The foundations of the new government were laid, he said, and its corner-stone rested, "upon the great truth that the negro is not equal to the white man; that slavery, — subordination to the superior race, — is his normal and natural condition." And he declared that it was the first government in the history of the world "based upon this great physical, philosophical, and moral truth."[3] The Confederacy speedily organized its Senate and House. The territory of Arizona was created, treaties were made with the Indian tribes, and each state and the territory of Arizona was constituted a judicial district.[4] In spite of the Vice-president's declaration, — that the old thorn of the tariff had been forever removed, — the Confederate Congress, just two months later, passed an act imposing duties upon imports,[5] and planned to rely upon the efficacy of the act for carrying on the government. Thus, within ninety days after the inauguration of Presi-

[1] Article I, section 10, clause 1.

[2] Article I, section 6, clause 2. This imitation of the British system proved a failure; the heads of the departments could not sustain themselves against the common attack of the members.

[3] Speech, March 21, 1861; Johnston's Orations, vol. iii, p. 164.

[4] Confederate Statutes at Large, Index "Judicial Districts."

[5] Act of May 21, 1861; Statutes at Large of the Provisional Government, pp. 127–135.

dent Lincoln, the United States was confronted by a thoroughly organized rebellion, extending over one-third of the national domain and including nearly one-third of the population of the Union.

The program of secession, which had been in process of formation during 1860, had received no check from the national government under Buchanan, who, in his last annual message, sent to Congress a month after the election of Lincoln and Hamlin, put the responsibility for the dissolution which then threatened the Union upon the northern people, and particularly upon the abolitionists. There was a striking similarity between a portion of this message and Webster's 7th of March speech, in that the message took up the grievances of the South against the North and emphasized how the North had violated the Constitution, particularly in its personal liberty bills and in its refusal to execute the fugitive slave law. But the abstract question of the power of Congress to coerce a state had become concrete since Webster's day. Buchanan could find no authority under the Constitution for the coercion of a state. It was a power not specified or enumerated, and had been expressly refused by the federal convention; therefore Buchanan saw no escape from the dissolution of the Union, unless, perhaps, the Constitution should be amended in three particulars, and each for the benefit of slavery: first by expressly recognizing the right of property in slaves, secondly by protecting slave property, and thirdly by executing the fugitive slave law everywhere in the Union. Such an amendment might save the Union.[1] Thus the whole attitude of Buchanan's administration toward the secession movement followed a let-alone policy, which perhaps would have been less disastrous if it had been strictly followed by Buchanan. He was at best a feeble President, and some of the members of his cabinet shared much of his feebleness. The secretary of the treasury, Howell Cobb, of Georgia, the secretary of war, John B. Floyd, of Virginia, and the secretary of the interior, Jacob Thompson, of Mississippi, were in active sympathy

[1] Message of December 3, 1860; Richardson, vol. v, p. 626.

with secession and in constant though secret touch with its leaders. They strengthened secession by every act in their power, and at last, when forced by public opinion North to resign from the cabinet, Cobb and Floyd loudly boasted of the services they had rendered to the Confederacy.[1] Congress responded to Buchanan's advice by devoting the last session of 1860 to perfecting and passing a constitutional amendment protecting slavery. This was the last of several attempts to compromise a question which had already passed beyond compromise. The other important attempts were the Crittenden resolutions and the Peace Conference.

The resolutions[2] which originated with John J. Crittenden, a senator from Kentucky, were based upon the principle of the Missouri compromise, and were approved by the legislatures of Kentucky, Tennessee, Virginia, and New Jersey. The line 36° 30′ should divide the territories. In those lying to the north of this line slavery should be forever prohibited; but in those to the south, slavery should be recognized, protected, and never interfered with by Congress. The people of these southern territories, when they became states, should settle the question of slavery for themselves. Congress should not abolish slavery within the forts or other federal territory in slave states, nor in the District of Columbia, so long as it was permitted in Maryland and Virginia. The interstate slave trade should never be prohibited. For every fugitive slave rescued by violence, the United States should pay the owner full value; but might sue the county in which the rescue occurred for the amount paid, and the county, in like manner, might sue the wrongdoer. These resolutions were presented at various times in Congress, up to the 2d of March, 1861, but were defeated in both Houses.

The Peace Conference was suggested by the Virginia legislature,[3] assembled at Washington on the 4th of February, and represented twenty-one states.[4] Virginia fa-

[1] Nicolay and Hay's Lincoln, vol. ii, chaps. xviii, xxv.
[2] Macdonald, Select Documents, p. 438.
[3] January 19, 1861.
[4] See Report of its Debates and Proceedings, 1864.

vored making the Crittenden resolutions an amendment to the Constitution, but the Conference finally adopted a set of resolutions which it proposed should be made the thirteenth amendment to the Constitution. These resolutions differed from the Crittenden resolutions in important particulars, but were like the Crittenden resolutions in their general purpose of perpetuating slavery. The Conference was presided over by John Tyler, lately President of the United States, a moderate man, and all parties hoped that its suggestion might conciliate the sections. But its proposed amendment was rejected by both Houses.[1]

A multitude of resolutions were now offered in both Houses as suitable constitutional amendments. In the Senate a special committee of thirteen [2] was created and in the House a committee of thirty-three,[3] who, it was hoped, might work out the desired change. The movement to secure it amounted to little more than an opportunity for senators and representatives to express their ideas of the true method of saving the Union. Little was said, however, by the Republicans in either House, for they knew that they were yet in the minority. The senators and representatives from states which had seceded or were planning to secede, though they said much, took little real interest in the discussion. As secession was a foregone conclusion, — a plan already agreed upon, — any amendment that might be adopted seemed to them wholly unimportant. They were preparing their farewell speeches, to be delivered when they should resign from Congress and join their friends at the South. But the two committees entered faithfully upon their work, well aware that while they were laboring zealously to preserve the Union by concessions to the South, the Gulf states were passing ordinances of secession and organizing a slave-holding confederacy. Finally, on the 26th of February, Thomas Corwin, of Ohio, the chairman of the committee of thirty-three, moved, as a substitute for the amendment

[1] February 27–March 3, 1861.
[2] December 18–20, 1860; Globe, p. 158.
[3] December 4–6, 1860; Globe, pp. 6, *et seq.*

which the committee had advised, a resolution to be known as "Article XIII," in these words: —

"No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere within any state with the domestic institutions thereof, including that of persons held to labor or service by the laws of said states." [1]

The House agreed to Corwin's substitute by a vote of one hundred and twenty to sixty-one, but when engrossed and read the third time the journal showed that two-thirds of the members had not voted in the affirmative and it thus stood defeated. But on the following day the question was reconsidered and the amendment passed by one hundred and thirty-three to sixty-five.[2] The House resolution was sent to the Senate on the day when Crittenden reported the resolutions of the Peace Conference, and William H. Seward brought in a joint resolution calling for a national constitutional convention. The Corwin amendment was made the order of the day for the 2d of March. An unsuccessful effort was made to substitute the Crittenden resolutions. Wilkinson, of Minnesota, who opposed both Corwin's amendment and the substitute which had been offered, declared that the Constitution was not in need of amendment. "The people of the Northwest," said he, "will never consent that the southern Confederacy take possession of the mouth of the Mississippi River. This act of itself will lead to war." And he offered an additional section to the amendment before the Senate, that "no state has the power to withdraw from the Union," but this was rejected by a vote of twenty-eight to eighteen.

Douglas at this point reminded the Senate of the shortness of the time, and urged it to pass the Corwin amendment, and then to take up the propositions of the peace conference. "This is not a question of compromise," said Zachariah Chandler, of Michigan, "but a question whether we have a government or not." "What has all this to do with the question before the country?" blandly

[1] Journal H. R., 1860–1861, p. 416. See the report of the Committee in H. R. Report, No. XXXI, 36th Congress, Second Session.

[2] Id. p. 426; Globe, pp. 1263–1264, 1284–1285.

inquired Wigfall, of Texas. "The Union is dissolved; Texas went out to-day; what do you propose doing?"

The Senate then took a recess until seven o'clock Sunday evening, long before which time the galleries and all available space on the floor were filled with spectators. They had come, not to witness the end of Buchanan's administration, but the beginning of Lincoln's.

Crittenden made a long, eloquent, but unsuccessful appeal for his resolutions. Finally, the Corwin amendment was read the third time, and the roll was called. Twenty-four votes were recorded in its favor and twelve against it, and the presiding officer, Trusten Polk, of Missouri, announced that it had passed.[1] The President, as is the custom at the close of the session, was in his room at the capitol busily signing his name to public acts. Shortly before the time fixed for the inauguration of his successor, Buchanan signed the proposed amendment which would make slavery in the United States national and perpetual. About an hour later, toward the close of his inaugural, Mr. Lincoln referred to the amendment, and said that "he had no objection to its being made expressly and irrevocable."[2]

The amendment went forth to the states, and a year later, on the 14th of February, 1862,[3] was ratified by the constitutional convention of Illinois. On the 14th of June following, the people of that state repudiated the convention by rejecting the Constitution which had been submitted, and thus made its ordinance of ratification of no effect.[4] The Ohio and Maryland legislatures also ratified the amendment, but it went no further, and was forgotten amidst the crisis of civil war.

The right and expediency of secession were discussed by President Lincoln in his inaugural. The central idea of secession, said he, is the essence of anarchy, the abdication of popular government; and in a message to Congress convening on the 4th of July, he declared that

[1] Senate Journal, pp. 382, *et seq.*; Globe, pp. 1402, *et seq.*

[2] Works, vol. ii, p. 6.

[3] Journal of the Convention, pp. 358, 450, 451; "Documentary History of the Constitution," vol. ii, p. 518.

[4] For the Constitution, 125,052; against it, 141,103.

the issue expressed more than the fate of the United States, for it represented to the whole family of man the question whether a constitutional republic could maintain its territorial integrity against domestic foes. The sophism consisted in the claim that a state could constitutionally withdraw from the Union. The Union, said he, is older than the states, and in fact created them as states. Their reserved powers do not include that of destroying it. This truth was the more forceful with respect to the newer states which had been organized from the domain acquired by the nation. Was it lawful and consistent that they should secede and repudiate their part of the national obligation? The seceders insisted that secession was constitutional, but in the Constitution of the Confederacy, which they had organized, they had discarded the principle of secession. If secession was justifiable, where was it to end, and what would prevent the continuation of anarchy and the formation of endless confederacies? If secession was right, then there must be an end to the republican form of government.[1]

The national government took measures to suppress the rebellion as speedily as possible. By the law of August 6, 1861,[2] rebel property was declared confiscated, and also slaves, whose labor contributed to the strength of the Confederacy. Before the close of the month, the act was interpreted in an unexpected way by a proclamation of General Fremont, declaring free the slaves of persons in the state of Missouri who had taken up arms against the United States.[3] The government was not ready for so radical, so unlawful, a measure, and the President soon ordered its modification. But the step Fremont had taken toward emancipation was never retraced. Slaves were hedged about by the laws securing every man's property from seizure for public uses without his own consent and without compensation, and though slave labor was now the sinews of the rebellion, all who supported the Confederacy insisted that the United States must respect the

[1] Message, July 4, 1861; Works, vol. ii, p. 55; Richardson, vol. vi, p. 20.
[2] Statutes at Large, vol. xii, p. 319.
[3] August 30, 1861; War Records, vol. iii, p. 446.

principle. The government did not enter upon the suppression of the rebellion with the purpose of exterminating slavery; its sole purpose was to preserve the Union.

The border states had not joined the Confederacy, and it was essential to the existence of the Union that they should remain loyal. A war on slavery would antagonize them and perhaps imperil the Union. But the war was changing social conditions and public sentiment. As the national armies advanced into the slave-holding states, fugitive slaves gathered about them in such numbers as to cause embarrassment. Were they persons or property? Should they be seized under the act of confiscation? Should they be returned to their masters, or should they be utilized as "contraband of war" for the benefit of the Union? Gradual emancipation had been tried in the older states in the early part of the century, but had been rejected in all the border states. Emancipation with or without compensation by the United States raised a new and a grave constitutional question. As a step toward its solution, the President drafted a scheme for compensatory emancipation in Delaware, in which state there were the fewest slaves.

Meanwhile, Congress had amended the confiscation act,[1] by providing that slaves escaping from masters engaged in rebellion and taking refuge with the army were to be treated as captives of war, and to be forthwith and forever free, and the President was authorized to employ as many negroes as he thought necessary in aid of the suppression of the rebellion. This authority to organize negro regiments was without precedent. On the 19th of June Congress abolished slavery in the territories of the United States,[2] and thus put into legal form a clause in the platform on which Lincoln had been elected,—that the normal condition of all the territories of the United States is that of freedom. A week later slavery was abolished in the District of Columbia, and the laws discriminating against persons of color in judicial proceedings were repealed. On the 7th of April the United States and Great Britain

[1] July 17, 1862; Statutes at Large, vol. xii, p. 589.
[2] Id. vol. xiii, p. 432.

concluded a treaty for the suppression of the African slave trade, agreeing to employ their navies to prevent the traffic.[1] Thus, in the months of June and July, 1862, Congress overruled the decision in the Dred Scott case as to its power to restrict slavery in the territories.

Delaware refused to co-operate with the President in a policy of gradual and compensatory emancipation; nevertheless the President sent a special message to Congress recommending the adoption of the policy. It was favorably received by Congress, but no state expressed a willingness to co-operate until co-operation was too late. Congress could abolish slavery in the territories, but, as Mr. Lincoln explicitly declared, his compensatory plan must be accepted by a state voluntarily, as "emancipation was a subject exclusively under the control of the states and must be adopted or rejected by each for itself." The United States had no right to coerce a state.[2] The President, foreseeing the extinction of slavery, now appealed to the representatives of the border states in Congress to avail themselves of his compensatory policy. He argued, after an economic fashion, that the money necessary to carry out the policy, — one hundred and seventy-four million dollars, — was no more than the cost of the war for eighty-seven days, and that it had better be saved in emancipation than sunk in war.[3]

The first form of the confiscation bill had not met the President's approval. It was startling, he said, to say that Congress could free a slave within a state; and yet, if it were said that the ownership of the slave had first been transferred to the Union, and that Congress had then liberated him, the difficulty would vanish.[4] This was recognizing the rights of property, and the right of a state to control its domestic affairs; in other words, Congress had no power to invade the right of a state by declaring slaves within it free. Emancipation must, therefore, proceed in the exercise of the war power. The slaves were equivalent to an effective Confederate army. If they were treated as munitions of war and eliminated from the contest, the rebellion would be so much nearer suppression.

[1] Treaties and Conventions, p. 454.
[2] March 14, 1862; Works, vol. ii, p. 137.
[3] Works, vol. ii, p. 132.
[4] Id. p. 210.

On the 22d of July, 1862, the war department authorized army and navy commanders to employ as laborers, and for military and naval purposes, as many persons of African descent as could be used advantageously. On the same day the President submitted to his cabinet the first draft of an emancipation proclamation. It provided that on the 1st day of January, 1863, all persons held as slaves within any state in which the constitutional authority of the United States was not practically recognized and maintained should "then, thenceforward, and forever be free."[1] This proclamation would free many slaves, but would not, because it could not, abolish slavery. It was conditional. If the people in the states in rebellion returned to their allegiance it would not be issued. The President was convinced that the proclamation would be supported by public sentiment in the loyal states, but he awaited a favorable moment for issuing it. On the 17th of September the army was victorious at Antietam, and five days later the proclamation was issued.[2] It freed the slaves in states and parts of states carefully designated, that might be engaged in rebellion on the 1st of January, 1863. It was issued as a war measure, and, as the President believed, was fully warranted by the Constitution. The majority in Congress and the mass of the northern people were in sympathy with it.[3]

Soon after Virginia had passed the ordinance of secession,[4] the people of the forty counties in the western part of the state organized a loyal government at Wheeling and proceeded to form a new state. In November a convention prepared a constitution, which in the following April was ratified by popular vote.[5] The petition for the admission of West Virginia raised a new question. Had the consent of Virginia been given in a lawful manner?

[1] Works, vol. ii, p. 213. The preliminary proclamation issued July 5, 1862.

[2] Lincoln's Works, vol. ii, p. 237.

[3] See the action of the House, December 15, 1862, as given in Nicolay and Hay's Lincoln, vol. ii, p. 171; also Congressional Globe, December, 1862.

[4] June, 1861.

[5] The convention assembled November 26, 1861–February 18, 1862. The vote was 18,862 to 514.

Could Congress admit it as a new state? Its constitution provided that no slave or free person of color should be suffered to enter the state, but this restriction was eliminated by Congress in the enabling act, which substituted a clause for the gradual emancipation of slaves after the 4th of July, 1863.[1]

The admission of West Virginia and the condition of gradual emancipation raised a constitutional question on which the cabinet was divided.[2] Congress put the responsibility of the decision on the President, who, though he thought it more properly a question for Congress to decide, did not evade it. To the argument of expediency, which was strong and unanswerable, was added one of authority. Had a majority of the qualified voters of Virginia participated in the decision favoring the organization of the new state? The consent of the legislature of Virginia was constitutionally necessary to the law allowing West Virginia to become a state. A body claiming to be such a legislature had given its consent. This could not well be denied, said the President, unless upon outside knowledge this body had not been chosen by a majority of the electors. "But," said he, "it is a usual practice in popular elections to give no legal consideration whatever to those who have not chosen to vote as against the effect of those who choose to vote; hence it is not the qualified voters, but the qualified voters who choose to vote, that constitute the power of the state."[3] As Lincoln expressed it, there is a difference between secession against the Constitution and secession in favor of it. He signed the bill, and on the 19th of June, 1863, West Virginia was admitted. It was the first slave-holding state which provided for gradual emancipation. So swift were changes in public opinion that in less than two years from the day of its admission its legislature was busily preparing a constitutional amendment for the immediate abolition of slavery.

In his annual message in December, Lincoln recommended to Congress an amendment to the Constitution providing compensation from the United States to every

[1] Enabling Act, December 31, 1862; Statutes at Large, vol. xii, p. 634.
[2] For its opinions, see Nicolay and Hay's Lincoln, vol. vi, p. 300.
[3] December 31, 1862; Lincoln's Works, vol. ii, p. 285.

state that might abolish slavery before January 1, 1900. Slaves freed by the chances of war during the rebellion should remain free, and provision should be made for colonizing free colored persons, with their own consent, at any place outside of the United States.[1] The President's policy was to recognize the loyal population of the states in rebellion as the body truly constituting these states, and to protect this population with national troops. This idea was the germ of Lincoln's policy of reconstruction, the true nature and operation of which, because of his sudden death, can never be known. Military governors were appointed for Tennessee, North Carolina, Louisiana, and Arkansas,[2] with the understanding that the national troops should be withdrawn as soon as the loyal inhabitants of these states had organized civil governments in conformity to the Constitution and were able to protect themselves.

When the 1st of January, 1863, came, the loyal people of the country were prepared to welcome the emancipation proclamation both as a military and as a political ultimatum. Its opponents denied that it freed a single slave.[3] Whether or not the proclamation was constitutional, it shook the institution of slavery to its foundations, for it made property in slaves wholly insecure. The admission of the negro into the army and navy put a new value upon him, both in his own estimation and in that of all loyal people. As soon as he was risking his life in battle for the Union he was on the way to admission to the civil and political privileges of white men. Thus the proclamation involved the ultimate question of United States citizenship for the negro, and aided to set aside the decision in the Dred Scott case.

Missouri did not come within the operation of the proclamation, but a policy of emancipation had been rapidly developing in that state.[4] In February, 1861, a

[1] December 1, 1862; Lincoln's Works, vol. ii, p. 261.

[2] March–May, 1862.

[3] See Joel Parker's Law Lectures delivered at Harvard College, 1866 and at Harvard and Dartmouth, 1867–1868; Hurd and Houghton, New York, 1866–1869.

[4] The authorities for statements respecting Missouri are the Journals

convention met at Jefferson City, and its loyal members succeeded in preventing the adoption of an ordinance of secession. Missouri had nothing to gain by joining the southern Confederacy. It had no sympathy with the policy of free trade, but at this time many of its people imagined that it might play the part of peacemaker between the sections. Some of its citizens believed that whatever side it favored would ultimately prevail. Pro-slavery men talked of "forty millions of slave property in the state that must be protected." They denied the right of the government to coerce a state, but recognized that the real coercion in the country was the force of events transpiring about them: the influx of foreign population, the rapid increase of the old, free states in wealth, and the prospective strength of new free states of the Northwest. Thus Missouri would soon be nearly surrounded by free soil, and the safety of her property in slaves would be imperilled. The issue in Missouri, therefore, was to pursue a policy most advantageous to the state. Though the peril to slave property was clear, none the less clear was the danger from negro emancipation. What would be done with the slaves if they were made free? However, these questions were not freely discussed in the state until about the time of the emancipation proclamation.

Most of the officials in power in the state, at the outbreak of the war, had been in sympathy with the Confederacy. The shock of war cleared the political air and laid bare the true interests of the state. This was shown by the action of the convention. It re-assembled on the 22d of July, 1861, declared the state offices vacant, passed ordinances affirming the loyalty of the state, and forever settled the question of its conjunction with the Confederacy. Thus, the act of the Richmond government which had admitted the state into the Confederacy[1] was made of no effect. Again, assembling in October at St. Louis, the convention denied the right of secession, but demanded that the national government should renounce any purpose

of its Conventions in 1861, 1862, 1863, and 1865; six volumes, February 28, 1861–April 10, 1865.

[1] November 28, 1861; Statutes at Large, C. S. A., 1861–2, p. 221.

to interfere with slavery. This was the last demand of the kind from any state.

In June, 1862, public opinion in Missouri had reached the point at which it was willing to tolerate gradual emancipation, and Judge Breckenridge offered an ordinance to this effect in the convention, on the 7th. He proposed that after the 1st of January, 1865, all negroes born in slavery in the state should be considered slaves until they reached the age of twenty-five. This was a remarkable ordinance to emanate from a slave-holding state. Its distinguished author told the convention that in Missouri the institution of slavery was doomed, for the war had already settled its fate. He wished to put the state on a plane with its free neighbors, and to attract its share of immigrants and foreign capital. He would develop its resources, which would never be developed as long as slavery was continued. But the state was in debt and could not bear the expense of compensatory emancipation, — this should be partly borne by the general government. On the preceding 10th of April, Congress, by a joint resolution, had offered to co-operate with any state in a compensatory policy of abolition.[1] But the majority of the members of the Missouri convention were unwilling at that time to accept the policy. The opportunity was never presented to them again.

Just three days after this decision of Missouri respecting slavery was made, one hundred and seventy-five men from the loyal counties of the state met in convention at Jefferson City for the purpose of inaugurating a campaign of emancipation. The President's proclamation followed soon after their assembling. The November elections indicated clearly enough the trend of public sentiment at the North, and a bill was introduced in the national House of Representatives, by one of the Missouri members, appropriating twenty millions to aid the state in the abolition of slavery. Its constitutionality was questioned. Could the United States perform a task which properly belonged to a sovereign state? The Missouri legislature also discussed the question, but reached no con-

[1] Statutes at Large, vol. xii, p. 617.

clusion, and the whole matter remained unsettled. Thus, at the close of the year 1862 no state had taken active measures to abolish slavery. In the following June, the governor of Missouri, Hamilton R. Gamble, reassembled the convention expressly to act upon the subject of emancipation. He still hoped that Lincoln's compensatory policy might be carried out, but the Missouri legislature would do nothing because it considered itself limited by the state constitution. Slavery, as every member knew, was doomed. There remained only to provide against the worst disasters which might follow. The evil days might be delayed. On the first day of the convention, Charles F. Drake, of St. Louis, submitted an ordinance for gradual emancipation and the abolition of slavery.[1] Various dates were suggested; and the committee finally reported a plan by which slavery should cease in the state on the 4th of July, 1876.

As in Kentucky in 1849, so now in Missouri, free and slave states were contrasted. Ohio, Indiana, Illinois, and Iowa, none of which by nature surpassed Missouri in wealth, it was said now far outranked her in production, population, and prosperity. The cause of the backwardness of Missouri was slavery. It was too late to expect compensation for slaves from the general government. Missouri must emancipate her slaves and thus give them up voluntarily, or be a witness to their flight from the state, and suffer from the loss of their labor. After an exciting debate, a constitutional amendment was adopted on the 1st of July. The scheme of gradual emancipation should begin on the 4th of July, 1870, but the scheme did not reflect the advanced thought of the state. An agitation, lasting two years, for abolition, now shook the state. The radical emancipationists took up the question, and at the presidential election of 1864 obtained full control of the government. Another convention was called, and met on the 6th of January, 1865, at St. Louis. On the 11th slavery was abolished, and an amendment, the language of which was taken from the ordinance of 1787, was adopted by an overwhelming vote. The news was tele-

[1] June 15, 1863.

graphed over the Union. Yates, the famous war-governor of Illinois, returned a congratulatory message. The news was laid before the House of Representatives at Washington, by the Speaker, Schuyler Colfax, on the 16th, and the official communication from the governor of Missouri was ordered to be preserved among the archives of the nation.

The policy of emancipation, with the political transformation which it implied, was also taken up in other slave-holding states. The emancipation proclamation applied to Arkansas, but not until August, 1863, did military movements enable its loyal people to gain control of the state. On the 8th of December the President issued a proclamation of amnesty and reconstruction,[1] very liberal and humane, offering full pardon to all persons, with few exceptions, who had been implicated in the rebellion. If not less than one-tenth of the number of persons who had voted in the state at the presidential election of 1850, and had taken the required oath and observed it, would unite in political action, the President was willing that they should be permitted to re-establish a state government. On the 5th of January, 1864, he sent to the commanding federal officer in Arkansas the necessary blank-books to be used in inaugurating the new government, and this day may be taken as the beginning of the so-called era of reconstruction. But the loyal people of the state had already assembled in convention,[2] and had declared the ordinance of secession null and void. On the 22d of January they abolished slavery. The President recognized the convention as a lawful body, and ordered General Steele to support it. The new constitution was ratified; loyal state and county officers were chosen, and the new government was inaugurated on the 11th of April. Congress refused to admit the senators and representatives which the new government chose, and showed a disposition to oppose the President's policy of reconstruction; but the state, trusting to the justice of its course, declared itself allegiant to the Union. It was the first slave-holding commonwealth to abolish slavery immediately and without condition. This was a state, not a national, act.

[1] Lincoln's Works, vol. ii, p. 443.
[2] Journal of the Convention, January 4–23, 1864.

Virginia at this time was in an anomalous condition. It seemed to have two governments: a disloyal one at Richmond, a loyal one at Alexandria. The Pierpoint government at Alexandria had authority over only a small portion of the state, but it represented the loyal people. On the 13th of February, 1864, a convention assembled at Alexandria,[1] representing the loyal citizens of the state, and on the 11th of April promulgated a new constitution, one clause in which abolished slavery. The President treated Virginia as he had treated Arkansas. Congress refused to recognize the validity of the Pierpoint government, but by one of those paradoxes which it is impossible to harmonize with precedents, Congress later considered the ratification of the thirteenth amendment by the Pierpoint government as the authoritative act of the state of Virginia.

The President's policy of reconstruction, which recognized loyalty wherever found at the South, led him in October, 1862, to lend a helping hand to the people of Louisiana.[2] He was anxious that the state should adopt a free constitution which would provide adequately for the education of the negro, but this should be done as far as possible without the aid of federal troops. The city of New Orleans and some adjacent parishes were under their control. Largely under the direction of the President, the government of the state was re-organized, and in January, 1864, Michael Hahn, the free state candidate, was elected governor. In a private letter to him,[3] Lincoln suggested that in defining the elective franchise the approaching convention should let in some of the colored people, as, for instance, the very intelligent, and those who had fought in the ranks of the Union. This was the first suggestion from President Lincoln that the right to vote might be given to the negro.

The convention assembled at New Orleans on the 6th of April, and after an exceedingly stormy session, amidst great excitement it abolished slavery on the 11th of May.[4]

[1] Journal of the Convention, February 13–April 8, 1864; Alexandria.
[2] Lincoln's Works, vol. ii, p. 247.
[3] March 13, 1864; Works, vol. ii, p. 496.
[4] Debates of the Louisiana Convention, 1864, pp. 208,

The President's suggestion about the franchise was partially carried out; the new constitution, while restricting the right to vote to white males, empowered the legislature to extend the suffrage "to such other persons as by their intelligence or military services might be considered entitled to it." [1] All able-bodied men in the state, irrespective of race, were to be enrolled in the militia, a more liberal provision than could be found at this time in the constitution of any free state. In October the legislature elected United States senators, but Congress refused to admit them.

Maryland, like Missouri, did not come within the operation of the emancipation proclamation. Since the opening days of the war public opinion had greatly changed in the state, so much so that its representatives in Congress, in January, 1863, had raised the question of compensatory emancipation in its behalf. A year later public opinion had advanced so far that the legislature appointed the 6th of April as the day when the people should decide the question of choosing a constitutional convention, the issue being plainly understood, and the question being answered by the election of sixty-one delegates, — out of ninety-six, — known to be in favor of emancipation.[2] Three weeks later the delegates met at Annapolis and began a discussion of public issues which ran on until November. The whole constitutional history of the Union was reviewed. Unlike Missouri, Arkansas, and Louisiana in 1864, Maryland was not under military pressure of any kind. It therefore discussed the question of emancipation with a freedom and completeness not elsewhere recorded. The argument of the emancipationists was economic; but that of the pro-slavery members was legal and, as they believed, strictly constitutional. To emancipate the slaves of Maryland, said the opposition, would violate the rights of property and set free a multitude wholly unfit to take care of themselves. At last, on the 24th of June, the vote was reached, and slavery in Maryland was abolished by a vote of nearly two to one; and in October the new constitution

[1] Louisiana Constitution, 1864; Title III, Article XV.

[2] See Debates of the Convention, April 27, 1864–September 6, 1864; 3 volumes.

was ratified, though by a majority of only three hundred and seventy-five votes. These epoch-making votes were cast by the Maryland soldiers in the various national camps.

While Maryland was discussing emancipation, the people of the territory of Nevada were engaged in framing a state constitution.[1] The territory had been organized scarcely three years.[2] It was needed as a state in 1864, much as West Virginia had been needed to help strengthen the national government in 1863. A convention assembled on the 4th of July, 1864. The majority of the members were natives of free states, and nearly one-third of them were natives of New York. Oregon had been organized as free soil, and California had been admitted as a free state. The prohibition of slavery, therefore, was to be expected in Nevada, and the prohibitory clause in the constitution easily passed without objection. But the delegates were not merely hostile to slavery; they believed that the paramount allegiance of every citizen was due to the federal government. This doctrine had come up in the Maryland convention and had been approved and embodied in the constitution of that state. But the delegates of Nevada carried the doctrine further, and declared in their bill of rights that the Constitution of the United States confers full power on the federal government to maintain and to perpetuate its existence, and that if within any portion of a state the people should attempt to secede from the federal Union or forcibly to resist the execution of its laws, the federal government, by warrant of the Constitution, might employ armed force in compelling obedience to its authority. This doctrine had been adopted by a constitutional convention in Nevada the preceding year, but the language was now slightly modified to express the idea that the federal government must operate within its constitutional powers, though the right of coercion was maintained.[3] But no delegate advocated negro

[1] Constitutional Convention, Debates and Proceedings, July 4–27, 1864.

[2] March 2, 1861.

[3] Nevada constitution, 1864; Article I, section 2. Debates of the Convention, p. 53.

suffrage, though the idea was less novel than that of paramount allegiance to the general government, or its right to coerce a state. The Nevada constitution was ratified by the people, and on the last day of October the state was admitted into the Union by proclamation of the President. It was the twenty-sixth to forbid slavery.

Tennessee was soon added to the free list. It consisted of two parts, an eastern and a western. The eastern was loyal. The state was not included in the emancipation proclamation. During 1863 and 1864 the portion of the state under the control of loyal citizens and national troops enlarged until it included nearly the whole state. Andrew Johnson, the military governor, declared in favor of emancipation. But Tennessee was in a condition of great political confusion. The party in power, for the time being, was loyal or disloyal, according to the successes of the national or of the Confederate armies. Finally, on the 9th of January, 1864, a convention, which at best was a revolutionary body, assembled at Nashville, and on the 14th adopted a constitutional amendment abolishing slavery. The amendment was ratified by popular vote.

Thus, while Missouri was feeling its way to emancipation, Arkansas, Louisiana, Virginia, Maryland, and Tennessee, abolished the institution, and two new states, West Virginia and Nevada, were added to the Union, the one adopting gradual emancipation, the other prohibiting slavery. An amendment to the national Constitution must be ratified by three-fourths of the states. Tennessee was the twenty-seventh state to prohibit slavery, and made up the number necessary to ratify an amendment abolishing the institution. While Missouri and other states had been adopting emancipation, Congress had been considering an abolition amendment. What reception would it be given by the people of America? Would they so amend the plan of the national government as to abolish slavery? Could the Union and slavery be preserved?

There was no escaping the issue. Events compelled decision. The threats, the warnings, the prophecies uttered during the years of compromise were now realized. An era of acrid discussion had been followed by civil war. The rights of free labor had refused longer to be mis-

managed. A true national economy compelled the abolition of a false sectional economy. There were no new principles brought to light; antagonistic systems had come to deadly conflict. The abolition of slavery meant the recognition of the rights of labor. Free, honorable labor was the chief corner-stone of national life. The natural condition of labor was not that of slavery.

Thus, behind the principles which the Fathers laid down in the eighteenth century, the American people were learning, by terrible experience, that there lies economic necessity. Equality of condition, as has often been pointed out by thoughtful men, and by none more forcibly than by De Tocqueville, in his classic work on "Democracy in America," — written a few years before the compromise of 1850, — equality of condition is the fundamental condition demanded by modern civilization, and it has been the destiny of the human race since the beginnings of its history.

The mighty law of economy was shaping government in America, in spite of constitutions, statutes, and judicial decisions. How vain, how feeble, appear these man-made barriers to its progress. And the equality of condition which was to be won in the battles of civil war was equality of industrial condition: the rights of free labor.

Unfortunately for America, political and industrial rights were confused, and industrial rights were recognized only so far as they could be expressed in political form. Seemingly, the American people had developed little capacity as yet to know that the foundation of a stable popular government is the universal recognition of the right of free labor. But there were seers and wise men who saw truly. Foremost among these was Abraham Lincoln. Running through his state papers, and his public and private utterances, is the solemn recognition of the rights of labor. "Fondly do we hope — fervently do we pray — that this mighty scourge of war may speedily pass away. Yet if God wills that it continue until all the wealth piled by the bondman's two hundred and fifty years of unrequited toil shall be sunk, and till every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it

must be said, 'The judgments of the Lord are true and righteous altogether.'"[1]

This man "who by the benignant favor of republican institutions rose from humble beginnings to the heights of power and fame,"[2] exemplified in no uncertain way and voiced in no uncertain language the conviction which the American people were slow of heart in believing, — that the evolution of government discloses a moral order, the determining force in which is the right of all men to freedom in labor. Popular government depends for its beneficence and perpetuity on the rights of requited toil.

In its political application this essential right took the form of emancipation in America during the period of the civil war. State sovereignty, protective tariffs, internal improvements, the acquisition of new territory paled in comparison. But the reformation — and it is a sorrowful comment on human government, that the abolition of slavery must come as a reformation — lay with the people themselves. Missouri touched the vital spot when she confessed that the alternative was emancipation or industrial stagnation. There was a higher, a moral law; and men and women were not wanting who confessed that slavery meant national degradation.

But great political and industrial changes proceed by a program of accepted precedents, or by innovations which shake the foundations of society. The re-constructive process initiated by the civil war may be best understood if its examination is approached through avenues laid out by the organizers and administrators in public affairs.

The principles of popular government in America, as laid down by courts of law and the constitutions of the commonwealths from the opening of the nineteenth century to the time of the civil war, if properly examined, enable us to understand more intimately the significance of the phase through which popular government in America was passing from 1850 to 1865.

[1] Second Inaugural, March 4, 1865; Works, vol. ii, p. 657.

[2] Resolutions of Senators and Representatives, April 17, 1865; Richardson, vol. vi, p. 290.

CHAPTER X

THE COMMONWEALTHS

From the opening of the nineteenth century to the civil war the Union increased from sixteen to thirty-four states, which in the aggregate adopted thirty-seven new constitutions and above one hundred and fifty amendments,[1] — an activity indicative of political ferment and social unrest. The large events were the acquisition of the Louisiana country,[2] the Floridas,[3] Texas,[4] California,[5] and Oregon,[6] and the extension of civil government, state or territorial, over the entire public domain.[7] It was the period of the acquisition and pioneer settlement of the West.

The movements of population — immigration and migration — largely determined the character of the civil institutions set up in the new states. New England and the Middle States overflowed into the old Northwest and across the Mississippi valley into Iowa, Minnesota, California, and Oregon, and the new constitutions of the West, in states above the latitude 36° 30′, perpetuated the distinguishing provisions of the organic laws of the free states.

South of the Missouri line, Missouri, Arkansas, Louisiana, and Texas perpetuated the distinguishing provisions of the constitutions of the slave-holding states, and it was expected that by subdivision Texas would develop into five commonwealths. But the line of cleavage between the political institutions and sentiments of the people of the North and of the South was not fully disclosed by the arbitrary Missouri line. The confluence of the two streams of population into the West, plainly traceable in the Ohio valley, as in southern Ohio, Indiana, Illinois, in

[1] See p. 301, note 2. [2] 1803. [3] 1819.
[4] 1845. [5] 1848. [6] 1792–1846. [7] 1850.

Kansas, and in the composite population on the Pacific coast, resulted in the growth of antagonistic ideas: pro-slavery and anti-slavery, which marked this central zone as one of political agitation. In spirit and practical administration the people of this middle zone were in sympathy with southern rather than with northern ideas of government.

The new constitutions of old states and the constitutions of new ones,[1] adopted during this period of sixty years, repeated the eighteenth century bills of rights, but with significant though few additions. New states at the North included in their bills of rights the anti-slavery clause of the ordinance of 1787. The new South incorporated in its organic law the declaration of the right of property in man.[2] In theory, at least as far as discernible from the bills of rights, the eighteenth century ideas of government still prevailed; but an examination of the articles on the legislative, the executive, and the judiciary, and of the distinctively new provisions on administration easily lead one to conclude that democracy in America was changing its ideas and ideals.

All the states now had the bicameral system, Vermont falling into line in 1836. But the traditional difference between the two Houses, — the exclusive right of the lower to originate money bills, — was passing away, and the state Senate was exercising the privilege with the House. Even more notable was the appearance, in new constitutions, in all quarters of the Union, of provisions limiting the power of the legislature, and chiefly its power to create corporations.[3] The panic of 1837 led to a revision of legislative authority to establish banks. The constitutions of New York and Iowa, of 1846, illustrate the conservative spirit of the times, and the early attempt of the people to protect themselves and the states from bankruptcy. With the development of the public land system, after 1834, came the provision common to the constitutions of western states, regulating land grants for educational purposes, and by 1860 these provisions in some

[1] For the list and chronological order of new constitutions, see the note to chap. xiii, pp. 301–302.

[2] Kentucky constitution, 1849.

[3] New York, 1846, and later constitutions in other states.

states had expanded into an elaborate article. The care of the free public schools was made a solemn obligation of legislatures. Indiana, Illinois, and Michigan illustrate the educational effort which as time has passed has become characteristic of the West.[1]

Another sign of change was the gradual adoption of specific limitations of legislatures: the beginning of the revolt against special legislation. Acts of assembly were still "public" or "private," under which latter title legislatures granted special privileges to individuals, often to the detriment of the public: changed local boundaries; granted divorces; manipulated county, township and city politics; created corporations; exempted property from taxation, and, in general, passed innumerable acts confusing to justice and in violation of economic principles of government. The development of canals and railroads was swift and extended, and legislatures granted franchises, and voted state aid, with dangerous liberality. The industrial evolution which distinguishes the period had its counterpart in questionable legislation, and it was in remedy of much of this legislation that new constitutions, and amendment of old ones, were made.[2] The people were learning by hard experience the peril of enthroning legislatures with unlimited powers, such as the early constitutions had granted. For the first time constitutions fixed the limit of state debts by naming the amount beyond which legislatures should not pledge public credit.[3]

Political parties appeared and disappeared, divided as was public sentiment, on the subject of reform. An element of no slight importance was the apportionment of representation: the division of a state into senatorial and assembly districts so as to secure the equities of representation. Every constitutional convention struggled with the problem, and put a solution of it into a clause of the Constitution. The single district system as worked out in Michigan, and incorporated in its constitution of 1850,

[1] Constitutions, Ohio, 1803, 1851; Indiana, 1816, 1851; Illinois, 1818 1848; Michigan, 1836, 1850.

[2] See particularly the western constitutions, 1835–1860.

[3] See the Kentucky constitution of 1849, and the debates on state debts in the convention of that year.

was one of the notable results of the struggle. But the constitutions present, in the aggregate, a rather confused mass of unsuccessful effort to apportion representation and maintain an equitable ratio.[1] No constitution proved a preventive of a gerrymander. The elaborate provisions for a state census, for utilizing the federal census, for regulating the area of counties, for equalizing urban and rural representation, and for redistricting the state at fixed periods of time, remain an index to much of the thought of the period.

Property and religious qualifications quite disappeared;[2] the vestiges remaining having slight practical importance. The period of required residence in the state, for voters and public officials was shortened, and a new requirement — United States citizenship — was imposed in all the states, save in one or two of the original thirteen. This constitutional recognition of the national government was consequent upon the admission of new commonwealths by Congress. It signified that these states were the creation, not the creator, of the United States: a very different basis of federal relations than that attributed by believers in state sovereignty, to the states in the Union, old or new. The concept of nationality was evolving in the public mind.

Of all the constitutions made during the period, that of Wisconsin, of 1848, was most liberal and complete, if tested by the principals which underlie American civil institutions. It granted manhood suffrage, irrespective of race, and was the only organic law in America which allowed an Indian to vote. Its concept of the functions of the state; its organization of the legislature; its provisions for education; for the safeguarding of public funds; for the equities of representation; for the performance of executive functions and for the administration of justice, mark it as a high type, — probably the highest type of constitutional work done by the people of a state during the period. Its continuation in force tends to confirm this estimate of its character.

[1] Ohio, 1851, adopted an elaborate method of securing proportional representation.

[2] Except in Delaware, property qualifications for state senators, constitution of 1831; in Connecticut, a freehold; in New York, constitution of 1846, for negro electors; North Carolina, 1835.

One cause of the limitation of legislative powers was the sorry experience of the people with lotteries, which in multitudinous form were legalized by legislatures during the early years of the century. But the lottery was hard to kill, and the silence of a constitution regarding it was evidence too often that the evil might be tolerated.[1]

It was one limitation of legislative power — the clause in the Missouri constitution of 1820, respecting free persons of color — which precipitated a discussion that, overspreading the country, fixed public sentiment, and determined an essential part of the Missouri compromise.[2] In 1848, the people of Illinois adopted a constitution which contained a clause almost identical in language with that in the Missouri constitution of 1820, excluding free negroes and mulattoes from the state, and it remained a part of the organic law of the state till 1870. But the Illinois provision attracted little or no attention, and provoked no controversy. Public sentiment outside of the states along the Canadian frontier — the extreme northern states — was hostile to the negro, slave or free. He was excluded by the state constitution from enrolment in the militia, and, except in five northern states,[3] was excluded from the suffrage.[4] But government in all the states was distinctively the white man's. There were no officials of the negro race.

In respect to this race, the constitutions adopted between the years 1800 and 1860 differed notably from those adopted during the eighteenth century. The earlier instruments are silent respecting the negro; the later ones explicitly discriminate against him. The unwritten constitution, public sentiment, and the actual administration of government, were hostile to the negro, slave or free. He was a man without a country. Anti-slavery agitation set in early in the century, and a powerful political party

[1] See Constitutions of Louisiana, 1812, 1845, 1852, and compare with those of Illinois, 1848; Wisconsin, 1848; Michigan, 1835, 1850; Tennessee, 1834, *et al.*

[2] See pp. 139–150.

[3] New Hampshire, Vermont, Massachusetts, New York, Wisconsin.

[4] For a detailed account of the Constitutional Status of the free negro, see the author's "Constitutional History of the American People, 1776–1850," vol. i, chap. xii.

whose creed was the exclusion of slavery from the territories, obtained control of national affairs in 1860; yet little evidence of the political agitations which grew out of slavery can be found in the state constitutions. Even the most liberal of these recognized the superiority and supremacy of the white race. But a period of agitation, debate, political ferment, and even of civil war may precede a revolution in public sentiment. The effects of anti-slavery agitation, it might be expected, would be traceable in later constitutions, adopted after the great issues were settled. Then the organic law would respond to new conditions. The years from 1800 to 1860 were years of agitation which culminated in civil war. We shall see, later, what changes this war wrought in the organic law of the states.[1]

Americans were learning, to their sorrow, that the mere mechanism of civil organism is not enough to guide and guard the welfare of the state. They were losing confidence in the theory of "checks and balances" which had appealed so seductively to the Fathers. Legislatures had multiplied foolish and evil laws, and the people were now devising checks and balances for the legislature. Clearly there were things which no legislature should be suffered to do; notably, to over-reach the credit of the state in support of so-called internal improvements; to charter wild-cat banks and permit issues of fiat money; to enact innumerable and contradictory private acts; and to gerrymander the state at the will of the party in power.[2] These and other offences legislatures had repeatedly committed; therefore they should be shorn of much of their power, and be compelled to act the wise law-maker.

To this end prohibitory clauses were inserted in new constitutions, and in amendments of old ones; the era of the restriction of legislative power began.[3] As an aid in reform, the power of the executive was utilized. The old distrust of governors was vanishing, and their civil value was appearing. Military notions which largely dictated the organic laws of the eighteenth century were

[1] See chap. xiii. [2] Kentucky, 1849.
[3] Western state constitutions, 1846–1857.

passing, and governors should be entrusted with the care of a respectable portion of the civil estate. One man, the governor, could be made responsible; many men, the legislature, had escaped responsibility. The new constitutions speedily expressed the conversion of the public to the new theory of executive place and power, and henceforth governors in America should participate in civil affairs by the exercise of the veto power, and by filling offices hitherto filled by the legislature; and the executive term should be lengthened so as to enable the head of the state to establish and carry out his own policy.[1] Hope and confidence went further; as was expressed in the substantial increase of governors' salaries, in the erection and furnishing of executive mansions, and in modest appropriations for the miscellaneous expenses of the executive department. But the substantial change was in the power of the governor; he was now a civil as well as a military factor in the business of the state.

The effect of this change was undoubtedly beneficial to the states, one evidence of which is the high characters who filled the executive office. For forty years of the sixty prior to the civil war, the Presidents and Vice-presidents were ex-governors. Notable among them were Madison, Monroe, Van Buren, Tyler, Gerry, and Tompkins. Scarcely less famed were Edward Everett, Seward, Marcy, Silas Wright, Oliver Wolcott, De Witt Clinton, Hamilton Fish, Robert Y. Hayne, Thomas Corwin, and Levi Lincoln, each of whom had served his state as governor.

The middle and later years of the period give date to the founding, by the states, of many charitable institutions, such as schools for the deaf, the dumb, the blind; asylums for the insane, and reformatories for criminals. Into the hands of governors was given the official care of these establishments, for the legislatures could not be trusted with the responsibility. Legislative partiality would fill these institutions with incompetent officials. The governor would appoint capable men. The appointing power of the executive began, and that notable change

[1] Constitutions, 1850–1860.

in American civil affairs which tends to place the executive nearer the centre of our civil system may be traced through the constitutions adopted after 1837.

In the state judicial systems the most notable change was the substitution of popular election for executive appointment. Democracy demanded this, and with no uncertain voice in the newer states. Every constitutional convention debated the relative merits of the two methods of securing judges, and the discussion in Kentucky, in 1849, remains a classic on the subject. As judicial business increased, the problem arose how best to perform it; whether by establishing new courts or by increasing the membership of the old ones. But democracy which is voracious for offices made a short solution by "branching the courts," as it was called in some quarters, and thus finding new rewards for faithful politicians.

In spite of the unreasonableness of democracy and the instability of the public mind, the courts suffered less than the conservative citizen feared they would suffer. The federal judiciary, firmly seated in its constitutional rights, was a check and balance in public affairs, and established a standard which even politicians wearing the state ermine could not wholly ignore. In spite of popular elections, short terms, and low salaries, the state judges, clothed with brief responsibility, made records which were not wholly discreditable. Legal procedure and practice steadily became simpler than in the eighteenth century. Earnest efforts at codification were made, as in Michigan and New York, a reform which the maze and multiplicity of the laws compelled. The brief provisions on codification suggest, however, that revision rather than codification was understood: as is attested by the volumes of revised statutes which were issued by the state printers.

Having boldly transformed the court into an elective body, democracy easily laid its hands on subordinate court offices, and long before the days of the civil war, these offices had changed from appointive to elective offices, according to the will of the dominant party. But in the old states the change from the appointive to the elective system was more gradual and less complete than in the West.

A notable change in the judicial systems was the increase of jurisdiction in district and county courts, incident to the establishing of new courts. The constitutions not infrequently specified the monetary limit of the jurisdiction, as in Georgia,[1] Mississippi,[2] Alabama,[3] Louisiana,[4] Iowa,[5] and Michigan.[6] The states of the South made fewer changes in their judicial systems than did those of the North. The South did not hasten to adopt the elective system, nor to multiply courts, nor to shorten judicial terms, nor to decrease the compensation of judges. Michigan, in 1850, by its constitution, fixed the salary of its circuit judges at $1500; Louisiana at this time paid $5500.[7] The southern and eastern bench and bar enrolled men of power and brilliancy unsurpassed in the annals of other portions of the Union in which the judicial innovations of the times were more hastily made. With the spread of these innovations, there went a popular disregard of the courts. The ancient sentiment of respect for the ermine faded away when the ermine was worn for a day by mere politicians not "learned" in the law. Much of the disrespect for courts, which characterizes the present time, is the consequence of changes and innovations in the judicial systems of the state, made before the civil war. One evidence of this is the different estimation in which Americans now hold the state and the federal courts.

It is in a new field, however, that the organic laws made during these sixty years indicate the changes through which the country was passing. Constitutional provisions respecting public lands, education, internal improvements, charitable and reformatory institutions, corporations, banks and banking, sinking funds, public indebtedness, taxation, and local government, indicate that the administrative function was securing attention as well as the legislative, the executive, and the judicial functions of the state. Seldom, as yet, did a constitution classify provisions under an administrative title, but distributed them in a confusing way, under the legislative or the

[1] 1812. [2] 1817, 1832. [3] 1819. [4] 1845.
[5] 1846. [6] 1850. [7] Constitution, 1845.

executive, or simply grouped them in miscellaneous mass at the end. But the beginnings of the administrative department were made. The theories and dogmas set forth in the first constitutions had proved too vague and uncertain guides, and explicit requirements were now inserted. Local and state indebtedness above a fixed amount must not be created, — a sharp antithesis to the general grant of power to legislatures in 1776. Thus the more evident details of a working administrative system were enumerated, though with loose notions of their operation or trend.

The country was awaking to industrial life. The people were attempting the first, the primitive development of its resources. State constitutions, like laws, follow but never lead public opinion, and in consequence are often behind the times. The organic laws of the states from 1800 to 1860 are an imperfect index to the industrial volume which was unrolling. Rather do these laws suggest the laborious efforts of men to adjust old theories to new conditions, with abundant evidence of the complexity of the civil problem.

Of state sovereignty the new constitutions contained not one word, and, save the constitution of Maine, of 1820, none recognized the paramount authority of the national government. The last attempt to insert the claim of sovereignty in the organic law of an American state was in Kansas in 1857, and this constitution was rejected both by Congress and the people of the state. But federal relations had become clearer to the people than in the eighteenth century. In all new states public officers must be citizens of the United States and must be inducted into office under an oath of allegiance to the general government. The acquisition of the vast domain between the Mississippi and the Pacific transformed the United States into a world power, and as the West was settled and the resources of the country were developed, the idea of nationality became clearer to all the people. Their thoughts moved more readily toward the capital city, Washington, and Congress, than to their state capitals and the legislatures. The President personified a higher authority than that of governor. The national courts were

the last resort in interstate and federal cases. And in the eyes of the world the American people were a nation.

However splendid the annals of a commonwealth, those annals were only chapters in the history of the United States.[1]

[1] For a detailed account of the constitutional development of the states during this period, see the author's "Constitutional History of the American People, 1776–1850," 2 vols. Harper & Bros., 1898.

CHAPTER XI

INTERPRETATION OF PRINCIPLES

SHORTLY before his death, President John Adams told a son of John Marshall that the appointment of his father as chief-justice of the United States was the proudest act of his administration. The appointment was made on the last day of January, 1801, and Marshall served as chief-justice thirty-four years, during which time he may be said to have enunciated the principles of the Constitution and to have laid judicially the foundations of American organic law. He was at the age of forty-five at the time of his appointment, and was perhaps surpassed in mere learning by several distinguished lawyers then in active practice. He has never been equalled by other American jurists in his faculty of discriminating principles and comprehending moral and legal rights. William Pinckney anticipated the judgment of posterity when he said that Marshall was born to be chief-justice of any country in which he lived. As a judge, he derived great assistance from the arguments of counsel, and the supreme court of his day was enlightened by the learning of Webster, of Ingersoll, of Pinckney, and of Choate, and of a large company of counsellors scarcely less famed. The cases which came before him may be said to have involved the fate of the national government. In the disposition of all of them his intellect shone with a brilliancy which has penetrated later times.

There is no doubt that Marshall's political opinions affected his decisions. He had supported the Constitution in the Virginia ratifying convention, and was recognized as one of the leaders of the federalist party. He took a broad and philosophical view of our national system, and interpreted it as one established for all time. While

he was chief-justice, sixty-one decisions involving constitutional questions were handed down by the court, and of these thirty-six were given by him. "A constitution," said he, in one of these decisions, "is formed for ages to come, and is destined to approach immortality as nearly as human institutions can approach it."[1] The immortality which he bespoke for the Constitution invests his decisions interpreting it. Not one principle which he laid down has ever been shaken, nor has one of his great decisions been reversed. Entrenched as is the supreme court in our civil system, its decisions may long run counter to the doctrines of a party in power. This was the case throughout nearly the whole of Marshall's judicial service. Between his decisions and the doctrines of the Democratic-Republicans there was nothing in common, and his decisions were given, as it were, between two extremes, Jefferson and Jackson. Could the Jeffersonians have abolished the court or changed the life tenure of its members to a tenure for years, it may well be doubted whether the Constitution would ever have received that national interpretation which distinguishes all of Marshall's decisions.

Perhaps the most remarkable fact pertaining to these decisions and to the administration of the general government by the democratic party from John Adams to Lincoln, was the survival of the principles as laid down in "The Federalist," and the abandonment by the people of many doctrines held by the democratic party during its early years. The most famous decision by Marshall's successor was in the Dred Scott case,[2] and that was speedily overruled by the results of the civil war. After the inauguration of President Lincoln, and the death of Chief-Justice Taney in 1864, the national executive and judiciary may be said to have held in common Marshall's views of the scope, character, and purpose of the Constitution. During the long period from the death of Marshall in 1835 to the appointment of Chief-Justice Chase in 1864, during which time the able and upright Taney was chief-justice, the national executive and judiciary were in sym-

[1] Cohens *v.* Virginia, 6 Wheaton, 377 (1821). [2] See p. 194.

pathy, and may be said to have interpreted the Constitution strictly according to its letter, and, generally speaking, according to the doctrines of the Jeffersonian school. But during this long period of twenty-eight years the supreme court did not reverse any of Marshall's decisions excepting indirectly in the Dred Scott case in 1857, and in this it was rather the dictum of the court than its judicial opinion which would neutralize Marshall's doctrine of the national character of the federal government. After the civil war the supreme court adhered closely to Marshall's principles of construction.

The court, prior to the appointment of Marshall as chief-justice, had existed eleven years, and had handed down decisions in six cases in which the Constitution had been construed. The most important of these cases was decided in 1794,[1] when the court maintained the supremacy of the national government and the right of a citizen to sue a state. But the decision, as we know, was soon overruled by the adoption of the eleventh amendment.[2] Marshall found the Constitution an almost unknown political quantity. He came as it were a new force in American government, and at the most opportune time.

The first case in which a court had declared void a law conflicting with the Constitution, had been decided in Rhode Island[3] only fifteen years before Marshall's appointment, and the decision was almost an innovation in judicial history. In 1803, he sustained the principle[4] in considering the right of one Marbury to a judicial office to which he had been appointed by President Adams, his appointment having been confirmed by the Senate, and his commission made out, signed, and sealed, but not delivered. He held that Marbury had a legal right to the office, and also that the provision of the judiciary act of 1789, which purported to give the supreme court original jurisdiction in such a case, was not warranted by the Constitution. The decision was of the highest importance, for it tended to establish the principle that the courts have

[1] Chisholm *v.* Georgia, 2 Dallas, 480.
[2] See chap. vi, pp. 103–106.
[3] Trevett *v.* Weedon (1786), 2 Chandler's Criminal Trials, p. 269.
[4] In Marbury *v.* Madison, 1 Cranch, 137 (1803).

jurisdiction to determine the constitutionality of acts which come before them in due course of law. Thus a broad distinction was laid down between the Constitution and laws that might be enacted by Congress. That it was the right and duty of the judicial department to say what the law is, was clearly laid down. In other words, the Constitution was the paramount law of the land. The decision was at every point corrective of the doctrine of the Kentucky and Virginia resolutions, and was in itself an augury of the long struggle for sovereignty which began soon after the enunciation of the doctrine of 1898. The decision was also of importance because it established the rank of the judicial department as co-ordinate with that of the executive or of the legislative. It declared that the Constitution had provided a tribunal for its final construction and for that of the laws and treaties of the nation.[1]

Having laid down the principle of national sovereignty, Marshall in later decisions deduced important corollaries from it. As the supreme law of the land, it outlined the characteristic distinction between the government of the Union and that of the states, and its language spoke not only the authority of the American people but also of the states themselves. Therefore the national government has authority to protect itself and execute its laws in all cases. The Constitution was formed for all time; and though its course cannot always be tranquil it is provided with the means of self-preservation. Being thus a national government in every respect,[2] its departments, — the executive, legislative, and judiciary, — are organized to act accordingly; whence it followed that Congress must possess the choice of means in making all laws which it might think necessary and proper, and the choice of means in carrying into execution the powers vested by the Constitution in the national government, or in any of its departments.[3]

[1] Marbury *v.* Madison, 1 Cranch, 137 (1803).

[2] Contrast this with the decision on this point in the Dred Scott case p. 194, *ante*.

[3] Cohens *v.* Virginia, 6 Wheaton, 377 (1821); U. S. *v.* Fisher, 2 Cranch 358 (1804). Compare "The Federalist," No. XVI.

The principle involved was expressed by the chief-justice in the following words: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are proper, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[1] Because the national government possesses sovereign power, it can acquire territory either by conquest or treaty,[2] and thus the constitutionality of the treaty under which Louisiana was acquired was sustained.[3] As the nation has sovereign power, the states cannot, by taxation or otherwise, impede its operation, or in any way control the exercise of its authority.[4] The force of this decision is clear. If the states could tax an agent of the national government, they could destroy that agency; and if they could destroy one agency, then they could destroy all. The American people, said Marshall, did not design to make the government dependent on the states. Because of its own sovereign powers, the national government could regulate the interstate commerce of the country, and all state laws conflicting with acts of Congress on the subject were inoperative.[5] From this principle of the power of the national government to regulate commerce, the supreme court has never departed.[6]

During the forty years following the adoption of the Constitution many public questions were practically settled by political interpretation, but others by very famous decisions which the court handed down. It held that it could declare an act of Congress unconstitutional, but that it could not point out the proper remedy for defects in an act.[7] This was the first great decision determining the jurisdiction of the federal courts. No less important

[1] McCullough *v.* Maryland, 4 Wheaton, 421 (1819).
[2] The American Insurance Co. *v.* Canter, 4 Peters, 511 (1828).
[3] See chap. viii, pp. 130–135.
[4] McCullough *v.* Maryland *supra*; Osborn *v.* The Bank of the United States, 9 Wheaton, 738 (1824); Weston *v.* Charleston, 2 Peters, 449 (1829).
[5] Gibbons *v.* Ogden, 9 Wheaton, 1 (1824); Brown *v.* Maryland, 12 Wheaton, 419 (1827); Wilson *v.* Blackbird Creek Marsh Co., 2 Peters, 245 (1829).
[6] See Kidd *v.* Pearson, 128 United States, 16 (1888).
[7] Marbury *v.* Madison, 1 Cranch, 137 (1803).

was its decision, that it could pronounce a state law unconstitutional, and that it was the final judge of the validity of a treaty.[1] So, too, the court defined its jurisdiction to include cases in which a state was a party and in which a right under the Constitution is involved.[2] The decisions also fully maintained the powers of Congress, whether expressed or implied; thus, it could establish territorial governments, or create a corporation like the bank, and could do all those things which in its judgment were necessary and proper to promote the general welfare.[3]

Shortly after the Missouri compromise, a great decision sustained the constitutionality of the act creating the bank, holding that the general government could protect the bank against invidious state legislation.[4] The character and extent of the powers entrusted to the executive were fully defined soon after the time of the Missouri compromise, in the decision that the President of the United States is the judge whether it is expedient to call out the militia to prevent insurrection or repel invasion.[5] The position of the states in the American system of government was also clearly defined. No state legislature might annul a judgment of a United States court [6] or repudiate its own grants,[7] or pass legislation violating contracts either private [8] or public.[9] All these decisions save one [10] were by Chief-Justice Marshall. They clearly and, as time proved, permanently defined the constitutional boundaries of the great departments of our government.

No less important was Marshall's clear elucidation of the principle of contracts and of the sanctity of their obligation. Though the principle is embodied in the words, "no state shall pass any law impairing the obli-

[1] Martin *v.* Hunter's Lessee, 1 Wheaton, 304 (1816).
[2] Cohens *v.* Virginia, 6 Wheaton, 224 (1821).
[3] McCullough *v.* Maryland, 4 Wheaton, 316 (1819); Story's Commentaries on the Constitution, pp. 1257, *et seq.*
[4] Osborn *et al. v.* The Bank, 9 Wheaton, 738 (1824).
[5] Martin *v.* Mott, 12 Wheaton, 19 (1827).
[6] United States *v.* Judge Peters, 5 Cranch, 115 (1809).
[7] Fletcher *v.* Peck, 6 Cranch, 87 (1810).
[8] Sturges *v.* Crowninshield, 4 Wheaton, 122 (1819).
[9] Dartmouth College Case, 4 Wheaton, 519 (1819).
[10] Martin *v.* Mott, 12 Wheaton, 19.

gation of contracts," and it would seem at first reading that no statement could be clearer, it was reserved for Marshall first to explore the recesses of the principle and bring its full meaning to light.[1] The case involving the principle of contracts which attracted the greatest popular attention was that of Dartmouth College, in 1819. It was of no more intrinsic importance than some other cases in which Marshall sustained the principle involved, but the brilliant argument of counsel, particularly Webster's, and the wide application of the decision to multitudinous matters growing out of contracts, have rescued the case from oblivion, and have given it primary importance. The great learning and eloquence of the counsel in the case, the character of the court, and the magnitude of the principle involved, make the case the leading one in our constitutional history establishing the inviolability of contracts.

Though ever watchful of the sovereign character and paramount rights of the national government, Marshall was equally careful to recognize the true position of the states and their relation to the national system. He never departed from the principle of residuary sovereignty which Hamilton had laid down in "The Federalist," and which he himself had advocated in the Virginia ratifying convention. Within its own sphere a state is as supreme as is Congress in national affairs.[2] His decisions in this respect are the precedents for Chief-Justice Chase's famous decision in later times, that the Union is an indestructible union of indestructible states.[3]

In Marshall's time much was said of the strict construction of the Constitution. "What do gentlemen mean by a strict construction?" inquired he, in one of his greatest decisions, rendered in 1824. "If they contend only against that enlarged construction which would extend words beyond their natural and obvious import,

[1] Fletcher *v.* Peck, 6 Cranch, 87 (1810); New Jersey *v.* Wilson, 7 Cranch, 164 (1812); Sturges *v.* Crowninshield, 4 Wheaton, 122 (1819); Ogden *v.* Saunders, 12 Wheaton, 332 (1827); Dissenting opinion by Marshall; Trustees of Dartmouth College *v.* Woodward, 4 Wheaton, 518 (1819); Providence Bank *v.* Billings, 4 Peters, 514 (1830).

[2] Barron *v.* The Mayor, etc., of Baltimore, 7 Peters, 243 (1833).

[3] Texas *v.* White, 7 Wallace, 700 (1868); see chap. xiii.

we may question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument, — for that narrow construction which would cripple the government and render it unequal to the object for which it is declared to be instituted, and which the powers given as fairly understood render it competent, — then we cannot observe the propriety of this strict construction, or adopt it as the rule by which the Constitution is to be expounded." [1] Marshall's principle of construing the Constitution is here clearly set forth; namely, to render it equal to the objects for which it was instituted, according to its own language. This is identical with the principle of Hamilton's well known political maxim, — that the means must be adapted to the end proposed.

It was very fortunate for the American people that a man of Marshall's capacity and character was at the head of the supreme court during the critical period when the national government was in process of organization and the foundations of our civil system were not known to the people. The country was no less fortunate in his associates, most of whom, during nearly the whole of his judicial life, sustained him. Had the supreme court leaned toward a strict construction of national authority during the first forty years of our history, there is little doubt that the general government would have been reduced to a mere agency for the states.

The closing years of Marshall's life were disturbed by changes in the court which threatened to overthrow the principles which he had laid down. The long continued triumph of the democratic party, beginning with the election of Jefferson to the presidency in 1800, culminated toward the close of Marshall's life in the election of Jackson,[2] and the transformation of the supreme court into a body of strict constructionists. Nearly all of Mar-

[1] Gibbons *v.* Ogden. [2] 1828.

shall's associates at the time of his appointment as chief-justice held political sentiments in sympathy with his own, but their successors, appointed by democratic presidents, were men of a different political school. Thus, by 1830 the court was so reorganized, by appointments to fill vacancies caused by the deaths of Marshall's earlier associates, that he stood almost alone. The appointment of his successor, Roger B. Taney, in 1835, by President Jackson, completed the change, and for the next twenty-five years the court was as democratic as under Marshall it had been federalist in its decisions. But during this long period of Taney's incumbency, fewer cases of the rank of those which Marshall had decided reached the court. Though the principle of the obligation of contracts was sustained, the court did not carry it so far as Marshall carried it in the Dartmouth College case, but left the state governments a larger discretionary power.[1]

Mr. Justice Story, who ranks with Marshall as a jurist, dissented from the opinion of Chief-Justice Taney in one of these cases,[2] holding that it departed from the principle laid down in the earlier cases. The court avoided political questions, at least during the earlier years of Taney's term. In one case, the celebrated boundary controversy between Rhode Island and Massachusetts, the chief-justice sustained the jurisdiction of the United States courts over such controversies.[3] In another case, growing out of a provision in the constitution of Mississippi of 1832, prohibiting the introduction of slaves into that state as merchandise, or for sale after the first of May of the following year, the court held that the constitution of the state was not self-executing, but required an act of the legislature to carry it into effect.[4] It was in this case that Webster advanced the argument that as the legislature of Mississippi had made no prohibitory law on the sale of slaves introduced into the state in a manner contrary to its constitution until 1837, therefore the act was unconstitu-

[1] In Charles River Bridge *v.* Warren Bridge, 11 Peters, 420 (1837).
[2] Id.
[3] The State of Rhode Island *v.* The State of Massachusetts, 12 Peters, 657; see also Luther *v.* Borden, 7 Howard, 1.
[4] Groves *v.* Slaughter, 15 Peters, 449.

tional by the clause in the federal Constitution which gives to Congress the power to regulate commerce.

A case of great interest arose in 1842,[1] involving the constitutionality of the fugitive slave law of 1793, and the manner of its execution. Mr. Justice Story and the majority of the court held that the authority to make laws relating to "fugitives from labor" rested exclusively in Congress. This identified the national government with slavery, and made it one of the chief corner-stones in the national civil structure. The chief-justice dissented, holding that the duty of executing the law, and of protecting the privileges and immunities of the citizens of the different states under it, rested with them. The political conclusions of these decisions were necessarily very different. If the chief-justice was right, then the fate of the fugitive slave law rested practically with the states: a doctrine very unpalatable to extreme slavocrats, who had ever insisted that it was the primary duty of the federal government to protect slavery in all its interests.

The dissenting opinion of Mr. Justice McLean in this case was quickly utilized by the Liberty party as a constitutional foundation for its anti-slavery doctrines. The party declared its approval of the doctrine "maintained by slave-holding jurists, that slavery is against natural rights and strictly local, and that its existence and continuance rest on no other support than state legislation, and not on any authority of Congress."[2] There was a striking analogy here to the tactics of the Democratic-Republicans in 1796, when they based their state sovereignty doctrine on the dissenting opinion of Mr. Justice Iredell in the case,[3] in which he held that a sovereign state could not be sued. Out of the claim of the Liberty party grew the doctrine which at last triumphed in the election of Mr. Lincoln, — that slavery was a local institution. The democratic-republican advocacy of the principle of Iredell's dissenting opinion culminated in the adoption of the eleventh amendment. The advocacy of the anti-slav-

[1] Prigg *v.* The Commonwealth of Pennsylvania, 16 Peters, 539.
[2] Liberty Party, Buffalo platform, August 30, 1843.
[3] Chisholm *v.* Georgia, see p. 103.

ery principles of the Liberty party culminated at last in the adoption of the thirteenth amendment.

Marshall had clearly outlined the character of the national government, and as clearly, though less in detail, that of the states. Taney repeatedly emphasized the equal rights of the states and their sovereignty within their respective spheres of action. He held that it would be contrary to the first principles on which the Union had been formed to confine these rights to the Atlantic states, and to deny them to citizens dwelling on the Great Lakes or the navigable streams flowing through the western states.[1] The great object of the framers, he said, was to secure "a perfect equality in the rights and privileges of the citizens of the different states; not only in the laws of the general government but in the mode of administering them." The tone of Taney's decisions has, unfortunately, been taken almost wholly from his decision in the Dred Scott case.[2] Unquestionably that case, as events proved, was the most celebrated which came before him. The issue at law involved no more than a question of jurisdiction, and had this issue been strictly considered the court would have done no more than to dismiss the case and leave it as it had been determined by the supreme court of Missouri; but the desire of the judges to give peace to the country led them to depart from a decision strictly resting on the legal matters involved and to enter upon a political excursion.

In contrast to Marshall's notable decisions on American nationality, Taney now held, in the Dred Scott case, that the United States were not for all purposes a nation; and in contrast to Marshall's broad construction of the powers of Congress, he now decided that Congress had no power to restrict slavery, and therefore that the ordinance of 1787, the Missouri compromise of 1820, and the multitudinous acts incorporating their provisions, were unconstitutional. Soon after the Dred Scott decision, the court sustained the constitutionality of the fugitive slave law of 1850;[3] but the decision was speedily overruled by events.

[1] Genessee Chief *v.* Fitzhugh, 12 Howard, 443 (1851).

[2] Dred Scott *v.* Sandford, 19 Howard, 393 (1857); for a further account of this case, see chap. x, p. 194.

[3] Ableman *v.* Booth, 21 Howard, 506.

The strict construction of the Constitution, as contained in the Dred Scott decision, was continued in a number of later cases.[1]

In almost the last case in which Chief-Justice Taney sat,[2] he denied the authority of President Lincoln to suspend the writ of *habeas corpus* at his discretion, holding that its suspension must be by an act of Congress. This decision, rendered in April, 1861, was at once given a political construction at the North. There could no longer be doubt that the chief-justice and the President disagreed fundamentally on the principles of constitutional interpretation. The *habeas corpus* case gave rise to a very wide discussion. The President's supporters took issue with the court, and the supporters of the chief-justice took issue with the President. The majority of northern people who made any examination of the case held to the President's view of it. "The Constitution," said he, "contemplates the question (the suspension of the *habeas corpus*) as likely to occur for decision, but it does not expressly declare who is to decide it. By necessary implication, when rebellion or invasion comes, the decision is to be made from time to time; and I think the man whom for the time the people have under the Constitution made the commander-in-chief of their army and navy is the man who holds the power and bears the responsibility of making it. If he uses the power justly, the people will probably justify him; if he abuses it, he is in their hands to be dealt with by all the modes they have reserved to themselves in the Constitution."[3]

Soon after the civil war, the supreme court decided that the President cannot suspend the writ, but may be authorized to do so by Congress.[4] President Lincoln's suspension of the writ was almost immediately ratified by Congress. He had acted in accordance with the principle

[1] Steamer "St. Lawrence," 1 Black, 522; The Prize Cases, 2 Black 635.

[2] *Ex parte* Merryman, Campbell's Reports, p. 646.

[3] Letter to M. Birchard and others, June 29, 1863; Works, vol. i, p. 361. For the decision of Chief-Justice Taney in the Merryman case, and the principal opinions which it drew forth from men of various parties, see Campbell's Pamphlets, Philadelphia, 1862.

[4] *Ex parte* Milligan, 4 Wallace, 114 (1867).

that in time of public danger, so imminent and grave as to admit of no other remedy, the President, as the chief executive and commander-in-chief of the armies of the United States, is justified in suspending the writ, under the pressure of visible public necessity. Congress merely did its duty in passing the act ratifying the President's conduct.[1]

As Marshall's opinions were characterized by a liberal construction of the Constitution, so Taney's were distinguished by a construction correspondingly strict. If it can be said that Taney had judicial predilections, he leaned toward the states rather than the United States. No more learned or upright judge has ever sat in the supreme court. He sought to maintain the even balance of the judicial scales. His later decisions, especially in the Dred Scott and Merryman cases, were so speedily reversed by the civil war that they possess only historical interest. It is clear that the trend of decisions in the highest court in the land were, from the opening of the nineteenth century to the years of Lincoln's administration, toward an interpretation of principles of government such as was first given in "The Federalist." The supremacy of the national government was maintained. This conclusion aided immeasurably in preparing the way for the abolition of slavery. We can see this now. The currents of national life were set strong toward industrial freedom. Conscious of the direction of the flow, a large portion of the American people, in 1857, considered the decision of the court in the Dred Scott case as an anachronism. Yet that decision was already the law in more than half the states in the Union.

Equality in condition might seem afar off, when the highest court in the country was pronouncing such equality unlawful. And the prospect of realizing that condition seemed forever closed by the laws and constitutions of the majority of states in the Union. There was, for practical purposes, however, a mighty force which our supreme judicial tribunal had fully recognized: the power of the people themselves to amend the system of government which the Fathers had instituted. This force, which

[1] Halleck, International Law, 380.

the founders of the government had recognized as one of the chief corner-stones, is essentially moral, and therefore essentially social. It has been called the principle or right of revolution; a better name is the right of adaptation. And it was the capacity of the American people to apply this principle in the crisis of 1860–1865 which ranks them as worthy descendants of the generation by whom the republic was founded.

As the years pass, and the mighty events crowded into the years of civil war are seen in their right perspective, the changes then wrought in the popular ideal of republican government are recognized as an adaptation; a civil adjustment, such as may be likened to the adaptation of fauna and flora to climate or geographical area. The law of evolution determines the course of government among men, as it determines the condition of society from age to age. Adaptation, civil adjustments, are not made without struggles, revolutions, or even death.

In vain may statesmen legislate, judges decide, and rulers decree, if their will is contrary to the shaping law of adaptation. They who win fame among their fellows because of the triumph of their ideas are they whose ideas were in harmony with the overruling principle in government, the principle of adaptation.

Seen in this light, the organism which we call government is a natural condition; society is essentially an exponent of the moral order. Popular government in America is not a fiction agreed upon by a dominant political power. It is not a mechanical device, attempted by men to protect the weak from the strong. If this is not true, then comes chaos.

Looking again into the most important decisions of the supreme court, one is cheered by the light they shed. The supremacy of justice, the law of peace, the rights of men, are the theme. We venerate the name of John Marshall because his thought, like Washington's and Lincoln's, was profoundly humane.

The large orbit of the moral order, which their thought pursues, seems the fitting course of national life.

CHAPTER XII

AMENDMENT

LET us resume the narrative of the evolution of political and civil ideas at the point in the prelude of war at which we delayed to consider the organization of the commonwealths and the interpretation of the Constitution by the courts.

On the 14th of December, 1863, James M. Ashley, of Ohio, offered an amendment in the House abolishing slavery, and on the 11th of January following, John B. Henderson, of Missouri, offered a similar one in the Senate. The Henderson amendment and one offered by Senator Sumner were referred to the judiciary committee, which on the 10th of February reported an amendment in the language of the ordinance of 1787. Senator Henry Wilson, later Vice-president of the United States, who represented the moderate anti-slavery sentiment of the country, pronounced the proposed amendment "the crowning act of a series restricting the extension of slavery." Senator Saulsbury, of Delaware, denounced it as unconstitutional and "beyond the power of the general government." The requisite number of states, he said, could not be found to ratify it; if the federal troops were removed from the South, not fifty of its citizens would approve the amendment, or recognize the authority of Congress. Senator Henderson, speaking for the border states, answered that war had changed the opinions of loyal slave owners there; they now agreed that the price of union must be the abolition of slavery. Sumner wished the amendment to read, "all persons are equal before the law," — a phraseology taken from the first constitution of France. But his colleagues believed that the language of the French constitution could not be made applicable to America, but that the language of the ordinance of 1787, which was well set-

tled by the courts, should be followed. The amendment was adopted in the Senate by a vote of thirty-eight to six, and was sent to the House, but there received no attention for seven weeks. When at last it was briefly debated, the discussion disclosed that though there would be votes enough to pass it as a resolution, there would be far too few to adopt it as a constitutional amendment. Its opponents pronounced it a violation of the original compact between the states, and insisted that slavery, if abolished at all, must be abolished by the act of the states themselves. The final vote was reached on the 15th of June. During the call, Mr. Ashley, foreseeing the result, changed his vote to the negative, that he might submit a motion for reconsideration at the proper time.[1]

During the week preceding the final vote, the national republican convention had been in session at Baltimore. Senator E. D. Morgan, of New York, in calling it to order, asserted that the convention would fail of its mission if it did not demand a prohibitory amendment: a sentiment received with applause, and embodied in the party platform. It was soon known that the idea originated with Mr. Lincoln. The President was thus renominated on a platform pledging the republican party to the adoption of an abolition amendment, and his re-election was interpreted as popular approval of an abolition policy. In due time Mr. Ashley gave notice of reconsideration, and on the 6th of January, 1865, again proposed the joint resolution, defending it in a speech of great power. Ratification by twenty-seven states was necessary, but he claimed that ratification by three-fourths of the states recognized by Congress would be sufficient. Much was said against the amendment: that it would centralize authority in the general government; that it would violate the rights of the states and would drive the loyal slaveholding states out of the Union. It was answered that the amendment was both necessary and expedient. The principal objection was stated by George H. Pendleton, of Ohio, the late democratic candidate for Vice-president, who argued that even if three-fourths of the states rati-

[1] The vote stood 93 yeas, 65 nays; 23 absent.

fied the amendment, this action would not make the amendment obligatory upon any state which might choose to resist it.

In his message, December 6, 1864, the President remarked on the recent failure of the amendment in the House, and recommended its reconsideration and passage. The November elections, he said, had shown almost certainly that the next Congress would pass the measure if this one did not; and as it was to be passed, then the sooner the better. Holman, of Indiana, one of the most influential Democratic members, saw in the amendment the entering wedge to the extension of the suffrage to the negro. As slavery was dead, he thought the amendment unnecessary and a dangerous precedent without benefit. The vote was cast on the 31st of January. Colfax, the Speaker, was the last member to vote, and he voted in the affirmative. The amendment was passed, but the victory was not strictly a party victory. Seventeen Democrats had voted with the Republicans, and eight Democrats who absented themselves and were not paired had contributed to its adoption. As is not infrequent in the passage of important resolutions, some members, less patriotic than selfish, had been influenced to withdraw their opposition by the promise of important offices for their friends, and of the adoption of legislation in which they were interested.[1]

On the 1st of February the President signed the joint resolution and it went forth to the states. Illinois ratified on the same day that the President signed the amendment. By the 7th of April, twenty states had ratified, including Maryland, West Virginia, Virginia, Missouri, Louisiana, and Tennessee. Amidst the joyous progress of the amendment, Lincoln, its real author, was assassinated, and Andrew Johnson became president. On the 29th of May the new President appointed provisional governors in seven of the insurrectionary states, and began the task of carrying out a policy of reconstruction. He advised each governor to call a convention that should frame a new state constitution and restore the state to its former federal

[1] Nicolay and Hay's Lincoln, vol. x, p. 84.

relations. Fourteen classes of persons were excepted from the benefit of the proclamation of amnesty which the President now issued. This proclamation had been prepared by President Lincoln, and his successor issued it without alteration. Mississippi was the first to convene.[1] Governor Sharkey advised the delegates to submit to the results of the war and to harmonize all difficulties. The sentiment of the convention was not ardently responsive to the President's appeal. The delegates insisted that slavery had been abolished by force, and therefore that the United States ought to take care of the freedmen. The convention complained of the presence of negro soldiers in the state as a source of social disturbance. The popular feeling was that all the blacks, in a general way, now belonged to the whites, and that they could expect no favors from their former masters. The freedmen were now considered as free persons of color had been considered before the war. They were a people without a country. The effort of northern people to open churches and schools for them at the South was resented.

In his amnesty proclamation, and in his proclamation inviting the southern states to reorganize their governments, President Johnson had said nothing of negro suffrage, but he suggested privately to Governor Sharkey the expediency of extending the right to vote to all persons of color who could read and who owned real estate valued at no less than two hundred and fifty dollars.[2] But the governor, knowing that the suggestion was premature, did not submit it to the convention. It is doubtful whether any northern state at this time, excepting perhaps New Hampshire, Vermont, or Massachusetts, would have given equal suffrage to the black man. New York had refused to do so in 1860, and refused again eight years later.

The Mississippi convention adopted an amendment abolishing slavery and declared the ordinance of secession null and void. But there was a strong party which

[1] August 14, 1865; see the Journal of the Proceedings and Debates of this Convention.

[2] See p. 293, *post*.

thought that the prohibitory amendment should have a preamble declaring that slavery was abolished in the state because it had already been abolished there by the action of the general government. The members had a horror of negro equality; they could not tolerate the thought of negro government. Now that slavery was abolished, would not negro suffrage soon be foisted upon them? The United States should compensate loyal men at the South for property lost during the war, and in justice should compensate the slave owners.

President Johnson had held out the hope that the ratification of the thirteenth amendment by Mississippi would practically restore the state to the Union. The convention would make the condition that, as the compensation for ratification, the representatives and senators of the state should be admitted to Congress. But an astute member observed that if the South wished to get back into the Union speedily, and to unite with the conservative party at the North in a struggle to control the next presidential election, it should not attempt to impose conditions; otherwise the northern radicals would keep the state out of the union. Give the negro the security of liberty and property, but go no further. The conservative delegates thought that they detected in the second clause of the proposed amendment something that might be destructive to the South. Under the power "to enforce the amendment by appropriate legislation," might not Congress attempt to extend the franchise to the negro?

Meanwhile Alabama, South Carolina, North Carolina, Georgia, and Florida had elected delegates to conventions, and these assembled during September and October, 1865. Texas convened in February following. The Mississippi delegates had expressed the sentiments of the people of the Gulf states: Slavery was dead because of the fatal blow which the federal government had struck, but the South should be compensated for its loss. In Alabama there was no doubt of the adoption of the amendment abolishing slavery; the only question was whether to make its acceptance conditional. The vote was reached on the 21st of August, and slavery was declared abolished. When the Mississippi convention abolished slavery in the

state it refused to take action on the thirteenth amendment, and not until December did the legislature take up the question, when, in the form of a long committee report,[1] similar to reports adopted by the legislatures of Delaware and Kentucky, it declared the amendment a violation of the reserved rights of the states, untimely, and not free from the latent purpose of elevating the negro race to social and political equality with the white race.

But the insuperable objection to the amendment was that it "broke down the efficient authority and sovereignty of the state over its internal and domestic affairs." The refusal of the legislature to ratify the amendment delayed the restoration of the state to the Union and continued it under federal military rule. The Alabama legislature ratified the amendment almost unanimously two days before the legislature of Mississippi adopted its unfavorable report. The governor of the state, Parsons, was anxious that Secretary Seward might announce it as the twenty-seventh to ratify, which, if true, would, as the secretary said, "fill up the complement of two-thirds and make the amendment a part of the organic law of the land." But the consent of two more states was necessary. Alabama was the twenty-fifth state to ratify and the thirtieth to abolish slavery.

In South Carolina, as in the other late insurrectionary states, there was no money to defray the expense of restoring federal relations, and they were defrayed by the national government. It was no less difficult to secure a capable convention in South Carolina than in other southern states, so few were its citizens who could be elected delegates, by the conditions of the President's proclamation. In order to have a convention, the President found it necessary to send pardons to twenty of the delegates chosen. It assembled in September,[2] and proceeded to re-organize the state government. The independent tone of its debates was somewhat paradoxical, the delegates appearing to think that they could yet regulate the condition of the African race to suit themselves. On the first

[1] December 4, 1865, House Journal.
[2] September 13–27, 1865; see its Journal, 216 pages.

day of the session, John A. Inglis, who, as chairman of the committee, had reported the ordinance of secession on the 20th of December, 1860, introduced an ordinance to abolish slavery. The language of the ordinance was the subject of much discussion. Should it not declare that the slaves had been emancipated by federal authority? The institution could never be re-established in the state. Finally, in language which simply declared slavery abolished, the ordinance was passed almost unanimously.[1] A new constitution for the state was also adopted, by which, though slavery was abolished, all persons of African race were excluded from the basis of representation. Meanwhile the President had become anxious over the dilatory proceedings, and had telegraphed Governor Perry, that if the convention was acting in good faith, the legislature ought immediately to ratify the amendment. This it did on the 13th of November, but with the provision that any attempt by Congress to legislate on the political condition of the negro would be unconstitutional and in conflict with the President's policy as outlined in his amnesty proclamation.

The President found it more difficult to secure a convention in North Carolina than in Mississippi or South Carolina; but one finally assembled on the 2d of October.[2] The ordinance of secession was repealed, and slavery was abolished by a unanimous vote,[3] but there was no approach to unanimity on any other subject. The President's anxiety for the amendment was soon relieved by the legislature, which, with but six dissenting votes, ratified the thirteenth amendment on the 1st of December.

A convention was out of the question in Georgia if the President's proclamation was to be strictly construed. But having declared his willingness to grant a pardon to all in the state who deserved pardon, the President made it possible for the Milledgeville convention to meet on the 21st of October with a full list of delegates. The most distinguished member was Herschel V. Johnson,

[1] September 19th.
[2] October 2–19, 1865; May 24–June 25, 1866; see the Journals of the two sessions.
[3] October 7th.

the candidate for Vice-president with Stephen A. Douglas in 1860. Georgia complied with the President's policy differently from any of its neighbors. It abolished slavery, not by an ordinance, but by inserting a prohibitory clause in the bill of rights of the new constitution of the state. But it did this with a sense of necessity. Just a month before the convention adjourned, the legislature, without debate, ratified the thirteenth amendment almost unanimously.[1] Georgia was the twenty-seventh state to ratify, and on the 18th of December, 1865, Secretary Seward, by proclamation, announced that the amendment had become a part of the Constitution. Oregon, California, and Florida ratified in December, New Jersey and Iowa in January, 1866; but Texas did not ratify till four years later, and Delaware and Kentucky rejected the amendment.

At the time the amendment was ratified, the negro population of the country numbered a little more than five millions, of whom four and one-half millions had shortly before been slaves. Government North and South was distinctively the white man's. Free persons of color were here and there allowed to vote, but were nowhere suffered to hold office. Emancipation and abolition were forced upon the South; they were the results of the war; but the stoutest southern heart might well tremble at the thought of four millions of enfranchised slaves suddenly let loose amidst a scarcely larger white population. President Johnson had held out the hope to the South that its ratification of the amendment abolishing slavery would restore it to its former federal relations, — a condition as bitter as inflexible. In every southern state which had ratified the amendment, there had been heard a voice of warning against any attempt to extend the elective franchise to the negro. In only one state, Texas, did a delegate suggest the admission of the negro to the right to vote at some future time.[2] But the refusal of Texas to ratify the amendment showed the prevailing sentiment in the state.

[1] December 9, 1865.
[2] Journal of the Texas Convention, February 7–April 2, 1866, p. 91.

With the exception of four northern states, all the others North and South had ever been hostile to negro suffrage. The thirteenth amendment secured freedom to nearly five millions of human beings. There were now above a million male negroes over the age of twenty-one years, and excepting about sixty-two thousand all these were in the former slave-holding states. If the franchise was extended to them, for every negro voter at the South there would be two whites, but at the North eighty-four whites. There were more negroes than whites in South Carolina and Mississippi. The races were about equal in Louisiana, and nearly so in Florida, Georgia, and Alabama. President Johnson held that the southern states which had ratified the thirteenth amendment were entitled to resume their place in the federal system. He disclaimed any constitutional authority to extend the elective franchise to the negro, and believed, although he had suggested the experiment to Governor Sharkey, that it was not yet time for so radical a change. Each state should act as it thought best in the matter. Congress had no power to make the extension.

The President undoubtedly had the letter of the Constitution and the laws and practices of government, both state and national, on his side; but the abolition of slavery raised a new problem in the solution of which these laws and precedents were of little use. The southern legislatures which convened under the provisional governments of 1865 passed many acts affecting the status of the freedmen. As a body of laws, these acts discriminated against the negro, but they were a most liberal departure from the old slave code. At the time they were made, negroes did not stand on an equality with white men in any state in the Union. The problem of making the political condition of whites and blacks equal affected every commonwealth in the Union. It provoked a counter-revolution which has not to this day ceased.

The belief at the South that Congress was responsible for the negro was held by Congress itself, in whose hands it took the form of the civil rights bill, presented by Lyman Trumbull, of Illinois, in the Senate on the 5th of January, 1866. Its advocates declared it next in impor-

tance to the thirteenth amendment. Its purpose was to obliterate all discrimination against the negro. On the 13th of March it passed, and was promptly vetoed by the President on the ground that Congress had no power to confer state citizenship. The negro, he said, was not qualified to vote or to stand on an equality with the white man. Moreover, eleven of the thirty-six states were as yet unrepresented in Congress, and these were the ones most deeply concerned in the whole question. But the President's chief objection to the bill was to its invasion of the rights and immunities of the states. By a very large majority in both branches, the bill was passed over the veto.[1] It was the first great act of congressional legislation on behalf of the African race.

In July, Congress, by joint resolution, restored Tennessee to her federal relations. Though Johnson signed the resolution, he objected to it as "anomalous, unnecessary, and inexpedient," claiming that as Tennessee had ratified the thirteenth amendment, and its action had been accepted by Congress, the state was already in the Union. On the 8th of January, 1867, Congress conferred the right to vote on negroes in the District of Columbia. The President vetoed the bill as "inexpedient and forcing negro suffrage upon the inhabitants of the District." He used the argument against it which had been often heard in constitutional conventions,—that to allow negroes to vote would invite multitudes of them into a state; but Congress passed the bill over the veto.

There was a striking analogy between this act, which gave negroes in the District of Columbia the right to vote, and the act abolishing slavery in the District of Columbia and the territories, which had preceded the joint resolution that became the thirteenth amendment. Congress now followed the suffrage act by another,[2]—that in territories of the United States the right to vote should not be denied "on account of race, color, or previous condition of servitude." It became a law without the President's signature. Its first application was to Nebraska, which had already been organized as a territory. The

[1] April 9, 1866.

[2] January 25, 1867.

legislature of this territory in February, 1866, submitted a constitution to the people, which was ratified, but it limited the right to vote to white persons. Congress promptly amended the former enabling act for Nebraska, so that the territory could not be admitted until the elective franchise "should not be denied to any person on account of race or color, except Indians not taxed," and its legislature, by a solemn public act, should assent to the conditions. Thus the precedent of Missouri in 1820 was applied strictly to Nebraska in 1867. The Nebraska bill was returned by the President with a veto message. He denied the authority of Congress to impose the electoral condition; for from the foundations of the government, each state had been left free to determine the qualifications of the voter. The whole matter, therefore, should be left to the decision of the people of Nebraska. But the bill was passed over the veto by a large majority in both houses. Nebraska complied with the condition, and was admitted as Missouri had been admitted in 1821.[1]

While Congress was effecting these radical changes, it was also engaged in discussing an amendment to the Constitution which would secure civil and political rights to the African race. To this end a joint committee of reconstruction had been appointed, consisting of six members of the Senate and nine members of the House.[2] Both before and after its appointment, many amendments were proposed in both Houses, involving the issues of reconstruction, namely, the extension of the franchise to the negro, the repudiation of the Confederate debt, the establishing of the basis of representation, and the definition of eligibility to office. Finally the joint committee combined the essentials of the many amendments which were offered in a joint resolution, which, modified through debate, became the fourteenth amendment, and was sent to the states for ratification.

This amendment, in the form of a resolution, was presented to the House on the 30th of April by Thaddeus Stevens, the chairman of the House committee. It consisted of four parts: the first, forbidding the states to

[1] See p. 148.

[2] December 13, 1865.

abridge the privileges or immunities of citizens of the United States; the second, enlarging the basis of representation by including within it all persons excepting Indians not taxed; in case of the denial of the elective franchise to any male citizen duly qualified, except for participation in rebellion or for other crimes, the basis of representation in the state should be proportionately reduced; the third, excluding all participants in the rebellion from the right to vote for members of Congress or presidential electors until July 4, 1870; and the fourth, repudiating the Confederate debt and all claims for loss of slaves. The debate covered a wide field. Supporters of the resolution held with John A. Bingham, of Ohio, that as all citizens of the United States were now free men, no state had the right to abridge their privileges and immunities. If a state persisted in discriminating against one class of the population, a corresponding decrease in the number of its representatives in Congress would be the just consequence. Moreover, such an arrangement would be an inducement to the southern states to extend the suffrage to the negroes, as it would increase the number of their representatives in Congress. The repudiation of the Confederate debt and of all claims for the loss of slaves was due to the people of the country; it, too, was an act of justice.

The opponents of the measure, ably led by Samuel J. Randall, of Pennsylvania, maintained that it violated the policy of discrimination which had always been exercised by the states, each of which should be left free to regulate the franchise. If the United States could interfere in behalf of one group of rights, it would soon be tearing down every barrier. The amendment would make an entire change in the basis of representation, and this, too, while eleven southern states were excluded from representation in Congress. "The President," said Mr. Randall, "has steadily pursued Mr. Lincoln's policy. The states are in the Union; indeed, they have never been out of it; they have declared their ordinances of secession null and void and are legally entitled to representation. The amendment involves the whole issue of reconstruction and means war, and not peace." James A. Garfield wished the

resolution amended so as to forever exclude all persons who had voluntarily adhered to the southern Confederacy, or given it aid or comfort, from holding any office of trust or profit under the government of the United States.[1] But the House refused to make any change, and passed the resolution as reported by the committee.[2]

More than two weeks elapsed before the resolution was taken up in the Senate. Senator Howard, of Michigan, proposed several changes, the history of which has identified his name with the fourteenth amendment. It should define United States citizens and those qualified to hold office under the United States or in a state, and should declare the inviolability of the national debt. The Howard amendments had been carefully considered in caucus, and were now submitted to Congress as the opinion of the republican leaders. The definition of United States citizenship was taken bodily from the civil rights law, and Howard argued that it would settle a great question long in need of settlement in the jurisprudence of the country. It was objected that this definition of United States citizenship would include Indians and Mongolians. But the objection was not sufficient to stand, and Howard's amendment was agreed to. His second provision, "which," Senator Fessenden said, "would prevent a state from saying that though a person is a citizen of the United States he is not a citizen of a state," was adopted with like unanimity of party support. Reverdy Johnson and other conservative Democrats objected that the provision went too far. Hendricks, of Indiana, thought that the exclusion from office should be limited to those who had participated in the rebellion. But there was no strong opposition to the repudiation of the Confederate debt, and of claims for loss of slave property.

Plainly there was much heterogeneous matter in the Howard resolution, but the grand committee, knowing well the party strength behind them, sagaciously combined the propositions so that all should stand or fall together. The opposition, therefore, was out-manœuvred. It might object to particular propositions, but the fate of one would

[1] Globe, May 10, 1866, pp. 25–45. [2] 127 to 37, May 10.

be the fate of all; because of the great republican majority in both houses, the adoption of each was a foregone conclusion, though had each been presented separately the vote might not have been the same. The stock argument of the Democrats against the amendment was the plain assumption by Congress of the right to prescribe electoral qualifications. On the 31st of May a test vote, thirty yeas and ten nays, disclosed the strength of parties in the Senate, and from this time opposition to the amendment was perfunctory. On the 8th of June the joint resolution, as amended by Senator Howard, received the vote of two-thirds of the Senate.[1] Five days later Thaddeus Stevens presented the Senate resolution to the House, at the same time announcing that the Republican members of the grand committee were unanimously in favor of the resolution and were willing that the vote should be taken at once. He congratulated the House that the privileges and immunities of every citizen were now to be extended to a race hitherto outlawed. It had been the dream of his life, he said, to see racial discrimination obliterated. Schuyler Colfax, the Speaker, put the question of concurrence, and the amendment was adopted.[2]

The attitude of the republican party toward the questions involved was well defined by the joint committee on reconstruction in its report submitted to Congress on the day when it offered the amendment. The President, so ran the report, had inaugurated military rule in the South. The provisional governors whom he had appointed had no authority to organize civil governments, for this power belonged exclusively to Congress. The President's act meant no more than that he would withdraw military rule just in proportion as the southern people manifested a disposition to preserve order and to establish civil governments. Congress was not in possession of the information that such governments had been organized. In all the insurrectionary states, excepting Tennessee and Arkansas, the elections had resulted in the choice of men notoriously hostile to the Union; therefore it remained with Congress to say whether these states were restored to their federal

[1] Yeas, 33; nays, 11. [2] 120 yeas, 32 nays, and 32 not voting.

relations. In waging war against the Union, the southern states became subject to all the rules of war and of its ultimate consequences. The question whether these states were in the Union or out of it was an unprofitable abstraction. It was a question for Congress to decide. The thirteenth amendment had abolished slavery but left the freedmen in an anomalous condition. Congress could not abandon them without first securing them their rights as citizens. The fourteenth amendment now proposed embodied the policy of Congress toward the southern states.

But this was not all. Congress proceeded to criticise the President's policy to restore the South to the Union. The southern conventions had all been irregular. The South had shown no disposition to change its opinions, but with very few exceptions had elected as senators and representatives in Congress men who had actively participated in the rebellion. Thus the South was not in a repentant state. It showed no disposition to place the colored race, though composing two-fifths of its population, upon terms of equality with the white race. On the contrary, the South exhibited on every hand intense hostility to the national government, and an equally intense love for the late Confederacy.

Confronted with such evidence as this, Congress felt itself forced to the conclusion that the states lately in rebellion were disorganized communities without civil government and without constitutions and other forms by virtue of which political relations could legally exist between them and the federal government.[1]

But the democratic minority of the joint committee held to another view; the states had never been out of the Union, they had complied with every demand of the national government; they had amended their constitutions and ratified the thirteenth amendment; they had elected senators and representatives who were entitled to their seats in Congress. Secession, tested by the ordeal of battle, had failed, and the South utterly abandoned it as an impracticable doctrine. These conflicting opinions within

[1] Report of the Joint Committee on Reconstruction, pp. vii–xxi.

the committee accurately reflected opinion outside of Congress, and the two great parties of the country had marshalled their hosts accordingly.

The prospect of the ratification of the amendment was not assuring. New England might be counted on favorably, but the border states and the whole South were sure to reject it; the West would probably ratify. New York was hostile to negro suffrage, and would probably reject the amendment. Ohio, Indiana, California, and Nevada were hostile. The consent of thirty states was necessary, therefore it was not without anxiety that the republican Congress sent the amendment forth to the states. At the North its ratification was made a party issue,[1] and as the Republicans controlled most of the legislatures it was ratified. The democratic members of the New Jersey senate refused to vote on the amendment, and the result was, practically, an adverse action. Oregon ratified by a majority of one.

In seven northern states[2] the Republicans at this time were uniting their forces to obliterate the word "white" from the constitutions. Minnesota had recently rejected an amendment to its constitution granting impartial suffrage, but it adopted the fourteenth amendment. A large portion of Pennsylvania, especially the eastern counties, was hostile to negro suffrage, but the legislature ratified. Nebraska adopted it on the 15th of June, 1867, which was a year lacking a day from the time when the amendment passed Congress. Twenty-two states had now approved it, including Tennessee, West Virginia, and Missouri. But in the fifteen southern states it had been almost unanimously rejected. Their legislatures, largely under the direction of the governors, had taken the ground that the South, having had no part in preparing the amendment, should not be asked to adopt it. As it had been prepared irregularly, its validity might well be doubted, even if it were ratified. Its adoption would signify that the Constitution was at the mercy of whatever party might be strongest for the time being.

[1] This is shown in the platforms of the State Conventions; see the Tribune Almanacs for 1866–1869.

[2] New York, Pennsylvania, Ohio, Michigan, Wisconsin, Minnesota, and Kansas.

The attitude of the South was exemplified by North Carolina, whose legislature, in rejecting the amendment, adopted the unfavorable report of the joint select committee of both houses.[1] The report went over the whole ground in controversy; namely, the exclusion of the southern states from representation in Congress; the origin of the amendment; its doubtful constitutionality; its repugnance to the constitutions, laws, and practices of the southern states; and above all, its invasion of the exclusive right of a state to regulate the suffrage. Moreover, it was destined solely to affect the South and to disfranchise a large and the most intelligent portion of its population. Its provision respecting the federal debt was superfluous, as the honest intention of the people was to pay it. As it empowered Congress to enforce all its provisions by appropriate legislation, it opened wide the door for sectional interference with a subject wholly beyond the range of federal legislation. In brief, the amendment indicated that the federal government had radically changed, and now threatened to concentrate all power and dignity within itself and to swallow up the states.

No less hostile were the legislatures of Delaware, Maryland, and Kentucky, which in elaborate resolutions declared against the amendment as violating state sovereignty and forcing negro suffrage on the people. Louisiana and Texas took no action. Thus, in the spring of 1868, the amendment stood rejected by nearly one-half the states in the Union.

Meanwhile testimony had been accumulating before Congress as to the condition of public affairs at the South. The committee on reconstruction had gathered a mass of evidence, all given under oath, which proved unparalleled acts of hostility and cruelty had been committed at the South toward the freedmen. Special committees were appointed, each of which thoroughly investigated the subject in charge, and in due time laid its report before Congress. The terrible aggregate was more than sufficient to compel Congress to enter upon a policy of reconstruction. A system of peonage had been substituted for

[1] December 13, 1866; Pamphlet, Raleigh, 16 pp.

slavery in parts of the South. Congress, on the 2d of March, 1867, abolished and prohibited the system everywhere in the Union. But the day of the enactment of this humane law is memorable for the enactment of the first reconstruction act, "to provide for the more efficient government of the rebel states." The act divided the South into five military districts, and put each district under martial law. The purpose of the act was to establish state governments, republican in form. As soon as any of the late Confederate states organized a government in conformity to that of the United States in all respects, and adopted a constitution acceptable to Congress, and the state legislature ratified the fourteenth amendment, Congress would admit representatives and senators from that state. The President vetoed the bill, "because," he said, "it makes the military paramount to the civil authority." He denied that no legal governments existed in the South, and asserted that Congress was intent upon creating there, instead, an absolute despotism. But notwithstanding his objections, the bill passed.

In a supplementary act, passed on the 23d of March, Congress required that the new constitutions at the South must be ratified, each by a majority of the whole vote in a state, at least one-half of the voters voting. This also was passed over the President's veto. In July, a second supplementary act was passed, which pronounced all the governments in the ten insurrectionary states illegal, and authorized the appointment of negroes to serve as members of boards of registration.[1] The President vetoed the bill for reasons he had given before. A contest had now begun between Congress and the President, and raged during the remainder of his administration.

Negro suffrage was almost as objectionable to the North as to the South. Maryland, in 1867, adopted a new constitution limiting the suffrage to white men, and Michigan in the same year rejected a constitution which proposed to give the negro the right to vote. New York assembled in one of the ablest of conventions,[2] and discussed negro

[1] July 18, 1867.

[2] Proceedings and Debates of Convention, June 4, 1867–February 28, 1868, 5 vols.

suffrage at great length; but under the guiding hand of its democratic leaders, shifted upon the people the responsibility of deciding on negro suffrage. In the November election of 1869, the electors refused, by a majority of forty thousand votes, to abolish the property qualification required of colored men by the constitution of 1821. Thus, while Congress was attempting to compel the southern states to adopt negro suffrage, Maryland, Michigan, and New York, to which the reconstruction acts did not apply, were rejecting the principle.

The first state to convene under the reconstruction acts was Alabama.[1] The registration showed a majority of fifteen thousand for a convention; but nearly all the whites had refused to vote. The negroes voted as in the other states in the South, — by virtue of the provision of the reconstruction acts, and under the protection of federal troops. The Alabama delegates framed a constitution, but it failed of ratification by about eight thousand votes, though seventy thousand had been cast in its favor. The clause in the reconstruction acts, which required that a constitution must be ratified by at least one-half the voters, was devised to protect the colored vote, but the hostile whites knew that they could defeat the law by remaining away from the polls. In order to save the work already accomplished in reconstruction in Alabama, Thaddeus Stevens, on the 11th of March, reported a second supplementary act, to the reconstruction law, providing that henceforth the adoption or rejection of a constitution by a southern state should be determined by the majority of the votes cast,[2] Stevens's proposition became law.

It was now practically impossible for a southern state to escape the adoption of a constitution to which its white citizens were opposed, and from this time reconstruction ran on speedily. The state conventions, for which the negroes voted unanimously, enrolled many negro delegates. The result was the production of a body of state constitutions made in strict conformity to the reconstruction acts. But the martial hand of Congress could not change the opinions of the intelligent white men of the

[1] November 5–December 6, 1867. [2] Act, March 11, 1868.

South, who looked upon the whole procedure as tyrannical and unconstitutional. In each convention there was a vigorous minority opposed to negro suffrage, who did not hesitate to tell the negro that he was unfit by nature to participate in civil government; who declared that the whole motive of Congress in thus dragooning the South into a compliance with the fourteenth amendment was simply partisan in order that the Republicans, for a time in power, might control, through the negro vote, those lately in rebellion. But the minority was powerless, except to talk and to enter its protest on the journals. In every state it voted and acted against negro suffrage.

The registration in South Carolina showed nearly twice as many black as white voters.[1] All the blacks voted for a convention, and the two thousand whites who voted, voted against it. Nearly two-thirds of the delegates chosen were negroes. Never was there a more curious spectacle than that of 1868 in the state of South Carolina, which a little more than eight years before had inaugurated a secession movement in a convention of slave owners. There now assembled, at Charleston, to form a constitution, sixty-three negroes and thirty-four white men. No less curious was the history of the constitution which they formed; it continued in force until 1895, outlasting every other reconstruction constitution. Every convention which assembled by authority of the reconstruction laws, was the scene of more or less disorder and violence. The members usually undertook to act as a legislature as well as a constitutional convention, and also at the same time to play the part of a political convention. Thus, they formed state constitutions, enacted ordinances, and ran a political campaign. The South Carolina convention nominated a state ticket, which was elected in due time.

The Florida convention speedily fell to quarrelling, and finally divided into two factions, each of which organized as a convention. At last, by the intervention of General Meade, a compromise was effected and a constitution was adopted. The reconstruction acts were carried out with

[1] 78,982 blacks, 46,346 whites.

difficulty everywhere in the South, and especially in Texas, where a reign of terror prevailed, and a convention would have been utterly impossible had it not been for the presence of federal troops. The state officials corroborated the appalling reports, which had already reached Congress, of the lawless condition of Texas, and no evidence of the carnival of crime was more discouraging than that given by the attorney-general, William Alexander. His testimony, and that of other state officials, as well as the testimony of the special committee appointed by the convention itself, showed that crime had never before been so rampant nor lawlessness so wide-spread. The people had been forced to take their protection into their own hands. The condition of Texas differed only in degree from that of other parts of the South.

Meanwhile legislatures had been ratifying the fourteenth amendment. Nebraska adopted it in June,[1] and was followed by Iowa in April of the following year.[2] Arkansas ratified unanimously,[3] and by a special act of Congress was readmitted to the Union. Florida, North Carolina, South Carolina, and Louisiana ratified by the 9th of July; Alabama ratified on the 13th. Individual bills for the admission of these states were immediately reported in Congress. The Republicans supported and the Democrats opposed them, for reasons which the respective parties had given when supporting or opposing the reconstruction acts.

Ohio, Oregon, and New Jersey withdrew their ratification of the amendment, and Delaware, Maryland, Kentucky, and California rejected it outright. But its adoption by Alabama enabled the secretary of state, William H. Seward, to announce its ratification conditionally; if the original adoption by Ohio and New Jersey was to be considered as in force, the fourteenth amendment had been ratified by three-fourths of the states in the Union.[4] On the 21st of July, Congress adopted a joint resolution, of which John Sherman was the author, declaring the amendment a part of the Constitution, and instructing Seward to

[1] June 15, 1867. [2] April 3, 1868. [3] April 6, 1868.
[4] "Documentary History of the Constitution," vol. ii, pp. 783–787.

issue the necessary proclamation. Thus the states of New Jersey and Ohio were counted as having ratified. The adoption of the amendment by the southern states was immediately followed by proclamation of the fact by the President, and by the passage of the "Omnibus Act" restoring these states to their federal relations. Virginia, Mississippi, and Texas had virtually rejected the amendment by refusing to entertain it. The senators and representatives of the South, excepting from these three states, were permitted to take their seats in Congress on the 25th of June, 1868. The South had not been represented in Congress for seven years.

The ratification of the fourteenth amendment placed the reconstruction measures of Congress beyond repeal. But might they not be nullified by the southern people? In one most important particular the amendment had failed; it had not induced the South to admit the negro to the suffrage for the sake of securing a greater number of representatives in Congress. The South felt that the amendment had been forced upon it at the point of the bayonet, and that the negro had been made the instrument of coercion. Thus it happened that all hatred of the amendment was now concentrated upon the unfortunate negro.

On the 21st of May, 1868, General Grant and Schuyler Colfax were nominated by the Republicans at Chicago, on a platform which approved the reconstruction policy of Congress. In July, at New York, Horatio Seymour and Francis P. Blair were nominated by the Democrats, on a platform which declared those acts "unconstitutional, revolutionary, and void"; and that the control of the suffrage "belonged exclusively to the states." Virginia, Mississippi, and Texas did not participate in the election, and by a concurrent resolution Congress ruled that the electoral vote of Georgia should not be counted so as to affect the result. The election of Grant and Colfax, and of a congress republican in both branches, by large majorities, was construed at once as proof that the majority of the people of the country approved the reconstruction policy of Congress.

The republican leaders now bestirred themselves to make secure all that remained uncertain, and particularly

to safeguard the right of citizens to vote "irrespective of race, color, or previous condition of servitude." A constitutional amendment to this effect had been proposed while the fourteenth was under discussion. The earliest proposition emanated from Senator Henderson of Missouri, who, on the 7th of March, 1867, had introduced a resolution which is of interest because it finally became the fifteenth amendment. But the attention of Congress was at that time concentrated on the fourteenth amendment, and the absorbing interests of reconstruction so dominated both houses, that not until six months after the fourteenth amendment had become a part of the Constitution did Congress seriously take up the resolution for securing impartial suffrage. It was discussed in its every aspect. The question, though a part of the general reconstruction policy, was different from any involved in the thirteenth and fourteenth amendments. Had Congress the right to pass a suffrage amendment? A very able discussion of this question followed. Each house passed a joint resolution, but finally the refusal of the House of Representatives to concur in the Senate amendments and the refusal of the Senate to recede from its position defeated the amendment. The long debate apparently had come to a lame and impotent conclusion.[1]

The negative vote was scarcely announced in the Senate, however, before Senator Stewart, of Nevada, moved to take up the joint resolution which Senator Henderson, of Missouri, had at first proposed, and which had been dropped for the resolution lately sent up by the House. Though very weary of the debate, the Senate refused to adjourn. The members of each House knew very well that the majority were in favor of a suffrage amendment, and that the failure to pass one was due merely to disagreement over the wording of the resolution. The matter had been discussed so long both Houses were in a querulous temper. Senator Howard wished an amendment that would clearly confer upon Congress the power to prescribe the qualifications of voters and office holders, both in the states and in the United States, but few of his colleagues

[1] February 15–17, 1869.

were prepared to support so radical a measure. Democratic members, like Senator Hendricks, were convinced that an amendment of some kind would pass, and wished to make it as free from objections as possible. At last, after many attempts to adopt an amendment in other forms, the Senate passed the Henderson resolution in its original form.[1]

On the 20th of February, the House took up the Henderson resolution. Bingham, of Ohio, moved to amend it so as to provide that the right of citizens of the United States to vote and to hold office should not be abridged or denied by any state on account of race, color, nativity, property, creed, or previous condition of servitude. This gave it nearly the form of the Senate amendment, which the House had just rejected. The end of the session was fast approaching, and the general sentiment was for a suffrage amendment, yet it seemed that none could be adopted. General Butler urged the House to concur with the Senate resolution lest nothing be done, and it be forever too late to pass an amendment. Boutwell, who controlled the time of the House, found more to object to in the modifications suggested by his colleagues than to the Henderson resolution. Finally, on the 20th of February, Bingham's amended resolution was passed, and the House requested the concurrence of the Senate.

In the Senate, Buckalew called his colleagues' attention to the fact that the resolution now did not differ substantially from the one which had originated with the Senate, and had been lately rejected by the House. Agreement, therefore, was quite possible, and the Senate decided to ask for a conference. Senators Conkling, of New York, and Edmunds, of Vermont, were appointed managers on the part of the Senate, and Boutwell, of Massachusetts, Bingham, of Ohio, and General Logan, of Illinois, on the part of the house. On the 25th, Boutwell made his report in a proposition, which, with the exception of three words,[2] was the same as that which had originated with the Senate. The report of Boutwell's committee was accepted by a vote of one hundred and forty-five to forty-

[1] February 17, 1869.
[2] The words "to hold office" were struck out in conference.

four, Colfax, the Speaker, voting in the affirmative. On the following day the Senate also accepted the committee's report, and on the 2d of March a concurrent resolution was adopted instructing the President to transmit the article to the executives of the states, as the proposed fifteenth amendment to the Constitution.

The Republicans considered the amendment to be the crowning work of reconstruction. Its language had been used in the civil rights bill of April, 1866, and in the enabling act for Wyoming, of July, 1868, both very recent precedents for so radical a measure. But the prospect of its adoption by the states was gloomy. Seven northern states had rejected negro suffrage within two years, and in five others the Democratic party might be strong enough to defeat the amendment. Even John Sherman, while defending the amendment in the Senate, had given warning of its possible defeat in Ohio. So uncertain was the prospect, Congress resolved to strengthen the chances of ratification by making the admission of Virginia, Mississippi, and Texas to federal representation conditional on the adoption of the amendment by these states. The situation of the freedmen had become serious in the last two years. The reports of outrages unsurpassed in cruelty were accumulating from every part of the South. The most ominous reports were from Virginia, Mississippi, and Texas.

The evidence submitted by the Texas constitutional convention [1] showed that that state was not ready for civil government. A rigorous act was passed by Congress on the 18th of February, 1869, affecting Virginia and Texas. All persons holding office under the provisional governments in the states, who could not subscribe to the oath of loyalty under the reconstruction act of July, 1862, were to be removed, and the President was authorized to submit the constitutions, which had been framed in these states and in Mississippi, to the people that they might take a separate vote on certain objectionable clauses which the conventions had adopted. All the objectionable clauses

[1] See its Journal, June 1st–August 31, 1868; December 7, 1868, February 6, 1869, 2 volumes.

were repudiated, and the constitutions were adopted. On the 8th of October, 1869, Virginia ratified the fourteenth and fifteenth amendments; Mississippi ratified both on the 17th of the following January, and on the 18th of February, 1870, the legislature of Texas, by joint resolution ratified the thirteenth, fourteenth, and fifteenth. These states were immediately admitted to representation in Congress. Texas had been unrepresented since the 11th of July, 1861, a period of nearly ten years.

At the time Texas ratified the fifteenth amendment it had been approved by twenty-eight states. New York had ratified on the 14th of April, 1869, but the legislature, democratic in both branches, elected in the following autumn, straightway adopted a resolution, introduced by Tweed, of New York City, withdrawing the act of ratification. In May, Ohio rejected the amendment, but meanwhile, the Republicans, by a new election, having secured a majority in the legislature, the amendment was ratified on the 27th of January, 1870. On the 19th of February, Minnesota made up the number of ratifying states required by the Constitution, and on the 30th of March, the Secretary of State announced that the amendment had become a part of the Constitution. Nearly a year later, on the 21st of February, New Jersey ratified. The amendment was rejected by Delaware, Maryland, Kentucky, Tennessee, Oregon, and California.

The fifteenth amendment was passed by Congress to complete the civil reforms wrought by the war. In the light of our later history, it may seem to some that Congress should have gone further and submitted an amendment which would have given to the United States full authority to define and regulate the right to vote and to hold office, and that such an amendment and no other would have prevented many subsequent evils which befell the negro at the South. But if we make a careful examination of the condition of public affairs at the time of the submission of the fourteenth and fifteenth amendments, we can understand the practical impossibility of securing the adoption of more radical measures than those then adopted. The fifteenth amendment would never have been ratified had it not been for the coercive

reconstruction acts. The state of public affairs enabled Congress to compel the late insurrectionary states to ratify the amendments; but the South ratified the thirteenth, partly in confidence that ratification would restore it to its federal relations, and partly because of the necessity of the situation. It ratified the fourteenth and fifteenth amendments under the coercion of reconstruction, — the coercion of the federal bayonet and of negro votes.

At the North the ratification of the thirteenth amendment, abolishing slavery, was an easy matter, but the ratification of the fourteenth and fifteenth amendments was strictly a party procedure; the Republicans favoring, the Democrats opposing them.

The nomination of General Grant for the presidency, — and he was the most popular man in the nation, — greatly helped the fifteenth amendment at the North, for it was known that he supported the reconstruction policy of Congress. Seymour and Blair stood committed against this policy, and they received nearly two-fifths of the popular vote of the country, which may be said to indicate fairly the strength of the opposition to the fifteenth amendment. It may be said also, that this amendment was carried, in so far as the policy which it embodied was made an issue at the polls, by three hundred thousand votes in a total of nearly six millions.[1] But this vote recorded far more than the triumph of a party; it recorded the triumph of a great principle in government and reversed the practice of the United States and of the states since their organization, and overthrew many cherished traditions of the American people. The thirteenth, fourteenth, and fifteenth amendments recorded in the most solemn manner a vital change in the American civil system.

The adoption of the three amendments of the civil war period was an adaptation of the supreme written law of the country to the industrial and political demands of the American nation. They were a vindication of popular government. In this adaptation no violence was done to any principle of government which the founders

[1] The popular vote, November 3, 1868, stood for Grant and Colfax, 3,015,071; for Seymour and Blair, 2,709,613; Virginia, Mississippi, and Texas not voting.

of the American system had advocated. Freedom and representation, — which the amendments give to the negro race, — were recognized as essential to popular government in 1776. The amendments extended the rights hitherto possessed and exercised by the white race in America to the black race. Adaptation was in this case an extension of a privilege, — the right to vote; and the recognition of a right, — freedom and representation.

The supreme law, by the addition of these amendments, reached a stage of adaptability to American conditions which may be said to approach completion. As a working plan of popular government this law now attained efficiency. The history of the growth of this supreme law, — this national Constitution, — is the history of more than the evolution of a form of words. All the efficiency of this Constitution might have been attained in another mode. The flexible English system comprehends and secures civil and industrial rights as completely as does the inflexible American system. A written constitution like ours does not of itself make life and property secure. It is the administration of the law which tests the law. An administrative rule may appeal so favorably to a people that they will incorporate it in their constitution of government. The constitution of Pennsylvania of 1873 provides that no law shall be passed except by bill; no bill shall be so altered on its passage through either House as to change its original purpose; no bill shall be considered unless referred to a committee, returned therefrom and printed for the use of the members; every bill shall be read at length on three different days in each House; and all amendments shall be printed for the use of the members before the final vote on the bill is taken.[1]

Each of these provisions is a transcript of the House and Senate rule on the subject at the time this constitution was made. Every state constitution illustrates a similar adaptation. So, too, does the national Constitution. The thirteenth amendment is a transcript of a portion, and the most important portion, of the ordinance of 1787. Several sections of the national Constitution are the direct out-

[1] Article III, sections 1, 2, 4.

growth of rules of Parliament, — such as the section defining the organization of the Houses, their rules of procedure and the rights and privileges of members.[1]

Close analysis of a constitution of government, written or unwritten, discloses that the supreme law is a composition of many laws which survive; it is an embodiment of civil experience. An entirely new constitution is practically impossible. It is not impossible that a constitution should carry meaningless and dead clauses, — an apposite illustration of which is afforded by existing state constitutions which describe the voter as a white man. No fewer than five states[2] still retain this discriminating word, though the discrimination was abolished in 1870 by the adoption of the fifteenth amendment. Similar and no less notable vestiges of the old order may be found in every state constitution in force in America. Veneration of forms, the love of the immediate and familiar, and the unwillingness of conventions to evoke hostility to a proposed constitution contribute to retain words, phrases, and clauses the value of which is largely historical. Any constitution at any time in force in America, stripped of its strictly administrative and of its effete provisions, would become a brief statement of rights; indeed, a brief bill of rights. But it is the administrative feature of a written constitution which gives it working value. The "ancient and undoubted rights" of men; the "natural rights of man," — of which so much was said at the time of the revolution, — are accepted by the mass of citizens in much the same spirit as they accept the ten commandments. It is the administrative changes and amendments which now stir the passions of men. The landmarks of the American civil system have been located. The problem now is to discover and utilize a system of administration which will realize for the citizen the rights and privileges expressed and implied in the principles.

Thus it follows that the easier it is to amend a constitu-

[1] Article I, sections 5, 6. For a detailed account of the authorship and sources of the constitution, see the author's "Constitutional History of the United States, 1765–1895," vol. iii, pp. 463–515.

[2] Maryland, constitution of 1867; Ohio, 1851; Michigan, 1850; Nevada 1864; Oregon, 1859.

tion, the more frequently it is amended; a working rule which goes far to explain why, out of some eighteen hundred amendments which have been offered in Congress to the national Constitution since 1789, only fifteen have been adopted. Yet since 1789 nearly one hundred state constitutions and above three hundred amendments to them have been ratified, the union increasing meanwhile from thirteen to forty-five members.

The difficulty in modifying the national plan of government by adopting amendments has necessitated resort to administration, which means reading into the text of the supreme law a meaning which, had it been possible, would have been expressed by verbal change. The inflexibility of the national Constitution has compelled political parties to depend on congressional legislation in order to adapt the national system to the needs of the country.

Not so in the states. There the constitutions have been made as flexible, practically, as laws. Delaware alone of the states made a new constitution excessively difficult to change, but the almost impossible conditions fixed by the constitution of 1831 [1] were met in 1896 and the new constitution of 1897 was straightway prepared. No fetters of like kind can ever be forged again in an American commonwealth. New York, Virginia, and Maryland made a new constitution possible once in twenty years.[2] But the conservatism of these states and of Delaware was not characteristic of American commonwealths. The newer communities, — those west of the original states, — placed few difficulties in the way of new constitutions. As frequently as the voters may will, the two Houses having voted a convention necessary, and the people having ratified this decision at the polls, Michigan authorized the calling of a convention once in sixteen years,[3]

[1] Article IX. The difficulty in Delaware was to obtain a majority of votes for a convention (*i. e.*, of the highest number of votes cast in the state at any one of three general elections next preceding the day of voting for a convention), and then to elect an assembly which should "deem a convention necessary." Amendment of the old constitution (1831) was almost as difficult.

[2] New York constitution, 1846, Article XIII, 2; Maryland constitution, 1867, Article XIV; Virginia, 1870, vol. xii, p. 2.

[3] Beginning with 1866, constitution, 1850.

and New Hampshire every seven years.[1] The possibility, and, in some sections of the country, notably the West, the probability of frequent revision of the state constitution, practically transformed this instrument into a code, which was responsive to changes in public opinion.

It is to the states that we must turn if we desire to follow the evolution of government in America after 1870. Their constitutions register changes in the popular concept of the organic law. A civil war, itself a mighty revolution, made possible the adoption of the thirteenth, fourteenth, and fifteenth amendments to the plan of the national government, and it may be affirmed that no equally radical change in that plan is probable save by the compulsion of events as imperiously dominating as were the causes of the civil war. The last three amendments were made in recognition of the changed condition of the negro race in America. That condition was both industrial and civil, and, therefore, political. The amendments confirmed the truth of judicial decisions, — that government in America as organized and administered down to 1870 was exclusively for the white race. To whatsoever extent persons of African blood participated in that government, the participation was exceptional, and not recognized by the supreme law of the land. It was local and not general in character.

The iconoclastic amendments transformed slaves into United States citizens. This change revolutionized government in all the states, but most radically in those which had been slave-holding. The necessity which the amendments, — or, more perfectly speaking, which the amended Constitution imposed on the people of the several states, — was to adapt local government to the newly recognized rights and the recently conferred privileges of the negro. The history of this adaptation comprises the critical chapter in the evolution of government in the southern states since the civil war. That evolution comprehends the organic laws which have been made since that war in the commonwealths to regulate the suffrage and the basis of representation.

[1] Constitution, 1792.

In the northern states and in those organized and admitted into the Union since the civil war, the evolution of government followed a course which, in large measure, was prescribed by the economic conditions growing out of that war; but, in a deeper sense, growing out of the tendency of industrial life in such a country as ours. The rights of labor are the chief factor in the civil evolution of the North since 1860. In a large and comprehensive sense these rights include all the rights in agitation since the civil war. But at the North the heavy hand of the race question was not felt. The race question at the South, the industrial question at the North, are the dual expression of doubt, difficulty, and change through which America has passed since the civil war. The years during which slavery was abolished and civil and political rights were given to the negro, form the period of reconstruction, so called. On the 1st of April, 1870, all persons born or naturalized in the United States and subject to its jurisdiction were citizens of the United States and of the state in which they lived, and could not be denied the right to vote on account of race, color, or previous condition of servitude. Chinamen and Indians not taxed were not included. Less than five years earlier, slavery was not abolished, and only white persons and about half a million free persons of color were citizens. No parallel can be found in history to the civil and political change effected in the brief period of five years in America. A brief summary of the successive acts in this stupendous change shows its origin and extent:

Congress, by law, August 6, 1861, confiscated rebel property; the ownership of slaves employed against the authority of the United States was declared forfeited.[1]

General John C. Fremont issued a proclamation, August 30, emancipating all slaves, the property, real or personal, of persons in Missouri who had taken up arms against the United States, or given its enemies aid or comfort. This proclamation was modified, by order of the President, so as to conform to the confiscation act of the 6th of August.[2]

[1] Statutes at Large, vol. xii, p. 319. [2] War Records, vol. iii, p. 446.

Compensatory emancipation was urged upon Congress by the President in November; Delaware refused to attempt it, likewise Maryland, Virginia, Kentucky, and Missouri.[1]

In April the United States and Great Britain concluded a treaty at Washington for the suppression of the slave trade.[2]

General David Hunter, on May 9, declared forever free the slaves in Georgia, Florida, and South Carolina. The President ten days later repudiated the order officially.[3]

Congress abolished slavery in all the territories of the United States, June 19, 1862.[4]

On June 26, Congress abolished slavery in the District of Columbia, and repealed the law which excluded negro witnesses in judicial proceedings.[5]

In July, Congress emancipated all slaves who escaped from masters engaged in insurrection. The President was authorized to employ freedmen in the suppression of the rebellion.[6]

President Lincoln issued his preliminary emancipation proclamation, September 22, 1862, that all persons held as slaves within any state the people of which should be in rebellion against the United States on the 1st of January, 1863, should be "then, thenceforward, and forever free." The final proclamation followed in January.[7]

West Virginia, organized as a state during the period from May, 1861, to June, 1863, was admitted into the Union.[8] Though a slave-holding state its constitution provided for gradual emancipation. The importation of slaves into the state was forbidden.[9]

Four former slave-holding states adopted constitutions abolishing slavery: Arkansas, Virginia, Louisiana, and Maryland, the latter also declaring the paramount auth-

[1] Lincoln's Works, vol. ii, p. 91; 1862, March 9, Statutes at Large, vol. xii, p. 132; March 14, Id. p. 137; Id. p. 617.
[2] Treaties and Conventions, p. 454.
[3] Lincoln's Works, vol. ii, pp. 154, 155, 205.
[4] Statutes at Large, vol. xii, p. 432.
[5] Id. p. 539.
[6] Id. pp. 591, 592.
[7] Lincoln's Works, vol. ii, pp. 213, 214, 225, 237, 238, 287, 288.
[8] June 19, 1863.
[9] Constitution of West Virginia, Art. IX, sec. 7.

ority of the United States. Louisiana empowered the legislature to extend the suffrage at discretion "to such other persons [negroes], citizens of the United States, as by military service, by taxation to support the government, or by intellectual fitness, may be deemed entitled thereto," — a provision suggested by President Lincoln to Governor Hahn.[1]

The republican party in convention at Baltimore renominated Lincoln and issued a platform, one clause of which demanded an amendment to the Constitution abolishing slavery, "as the cause and the strength of the rebellion."[2]

Nevada was admitted as a free state, its constitution in its bill of rights declaring the paramount authority of the United States and its right to coerce a state — the latter the only declaration of the kind found in an American constitution.[3]

Missouri and Tennessee abolished slavery in January, and on the 1st of February Congress passed the resolution known as the thirteenth amendment. It was ratified, according to a proclamation issued by the Secretary of State, William H. Seward, December 8, 1865. Among the ratifying states were Maryland, West Virginia, Virginia, Missouri, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, Georgia, and, shortly after the secretary's proclamation, Florida.[4]

During the summer and autumn of 1865, "restoration" conventions assembled, in compliance with the proclamations of President Johnson, in Mississippi, Alabama, South Carolina, North Carolina, Florida, and Georgia. The constitutions promulgated abolished slavery, but excluded the negro from the basis of representation and from the franchise. President Johnson, in a letter to the provisional governor of Mississippi, William L. Shar-

[1] 1864, Arkansas, January 22, Convention Journal; Virginia, March 10, Journal, pp. 17, 18; Louisiana, May 11, Debates, pp. 221, 224; Constitution, title iii, sec. 15; Maryland, June 24, Debates, p. 742, Constitution, Declaration of Rights, Art. V; Lincoln's Works, vol. ii, p. 496.

[2] June 7, McKee's Platforms, p. 71.

[3] October 30, 1864, Convention Debates, p. 53; Constitution, Art. I, sec. 2.

[4] 1865, Missouri, January 11, Journal of Convention, p. 25; Tennessee, January 14, Annual Cyclopedia, 1864, p. 768; Congressional Globe, 1865, pp. 530, 531.

key, urged the extension of the suffrage to negroes who could read and write the Constitution of the United States in English, who owned real estate of the value of two hundred and fifty dollars, and paid taxes. The President's recommendation was not made known to the convention. That body was uncompromisingly hostile to negro suffrage, as was the convention in each of the six other states.[1]

Congress, by the civil rights act of April 9, 1866, conferred citizenship upon the negro. The act was passed over the President's veto. Texas adopted a new constitution abolishing slavery.[2]

Congress, on the 13th of June, passed a joint resolution known as the fourteenth amendment and submitted it to the states. It defined who are citizens of the United States and of the states, provided for the apportionment of representation among the whole number of persons in each state, disfranchised classes of persons who had participated in the rebellion, guaranteed the validity of the public debt, and declared illegal and void all debts, obligations, and claims incurred in aid of the rebellion or for the loss or emancipation of any slave.

Congress gave negroes in the District of Columbia the right to vote, passing the act over the President's veto.[3] A few days later, Congress enacted that in territories of the United States thereafter organized, the right to vote should not be denied on account of race, color, or previous condition of servitude.[4]

The act was extended to Nebraska as a condition of its admission. The people of that state had submitted a constitution to Congress by which the suffrage was restricted to white males. The legislature of the territory, on the 20th of February, formally complied with the condition, and the state was admitted by proclamation of the President March 1, 1867. Its motto was significant of the great issue of the times: "Equality before the law."[5]

[1] For a detailed account of the "restoration" conventions and their work, see the author's "Constitutional History of the United States, 1765–1895," vol. iii, p. 157–232.

[2] Statutes at Large, vol. xiv, p. 27.

[3] January 8, 1867, Id. p. 375.

[4] January 25, Id. 379.

[5] Id. p. 391; Richardson vol. vi, p. 516.

On the day following the admission, the negro suffrage act of January 25th was extended to apply to the territory of Montana.[1]

Congress abolished and forever prohibited peonage in the United States, and on the same day passed the first of the notable reconstruction acts by which the southern states were directed to establish governments republican in form. Every male person twenty-one years of age or more, a citizen of the United States, was made an elector in the state in which he resided. The governments instituted in the states under the "restoration" constitutions were declared illegal. Defects in the reconstruction act were later corrected by Congress, by supplementary acts chiefly directed to the manner of calling the constitutional conventions, and to the ratification of the new constitutions, which should be by a majority of the votes cast. The important features of congressional reconstruction were the extension of the suffrage to the negroes within the states affected by the act, and also the extension to negroes of the right to hold office. It was by authority of these acts that negroes lately slaves, in the South, for the first time voted and held office. By the first constitution of North Carolina, 1776, and by that of Tennessee, 1796, free persons of color were entitled to vote. The privilege was abrogated in the latter state in 1834, and, in the former, a year later. There is no evidence that the technical inclusion of free negroes as voters in these states was other than by accident and inadvertence. The reconstruction acts wrought an innovation in the suffrage and in the apportionment of representation.[2]

On July 28, 1868, the Secretary of State proclaimed that the fourteenth amendment had been ratified. It was rejected by Delaware, Maryland, Kentucky, Mississippi, and Texas. During the years 1867 and 1868 the late Confederate states framed new constitutions which granted the suffrage to citizens of the United States, and apportioned representation without discrimination on account of race, color, or previous condition of servitude. Mich-

[1] Statutes at Large, vol. xiv, p. 426.

[2] March 2, Id. pp. 428–430, 546; July 19, Id. vol. xv, p. 14; March 23, Id. p. 2; 1868, March 11, Id. p. 41.

igan, at the April election of 1868, rejected a new constitution which conferred the suffrage on the negro; the question of suffrage extension being a special issue. By the adoption of the fourteenth amendment, the suffrage clauses in state constitutions were not changed. Thus the anomaly was presented of negro suffrage in the South, and exclusive white suffrage, except in three states, at the North. The negro at the South was a voter by force of the reconstruction acts.

Would he remain a voter if they should be repealed?[1]

Congress passed the resolution known as the fifteenth amendment,[2] which declares that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. On the 30th of March, 1870, the Secretary of State proclaimed that it had been ratified by the requisite number of states. It was rejected by Delaware, Maryland, Kentucky, Tennessee, Oregon, and California. By virtue of this amendment the discriminating word "white" as a description of a voter in state constitutions was nullified.

The fourteenth amendment defined who are citizens of the United States, and its main purpose was to establish the citizenship of the negro. It did not transfer to the national government the entire domain of civil right be-

[1] For a detailed account of reconstruction, see the author's "Constitutional History of the United States, 1765–1895," vol. iii, book vi.

The state of public opinion regarding negro suffrage at this time may be known from the platforms of political parties as formulated at the state conventions. The Republicans favored, the Democrats opposed, the fourteenth amendment. See Republican conventions at Concord, N. H., January 3, 1866; at Montpelier, Vt., June 20, 1866; at Syracuse, N. Y., September 5, 1867; at Springfield, Ill., August 8, 1867; at Topeka, Kan., September 5, 1867; at Madison, Wis., September 4, 1867; at Williamsport, Pa., June 26, 1867; at Worcester, Mass., September 12, 1867 — all approve the policy of Congress. See Democratic conventions, at Concord, N. H., February 7, 1866; Nashville, Tenn., February 22, 1866; Montpelier, Vt., June 29, 1866; Albany, N. Y., September 11, 1867; Columbus, O., May 24, 1867; Springfield, Mass., August 29, 1867; Topeka, Kan., January 10, 1867; Madison, Wis., September 11, 1867; Harrisburg, Pa., June 11, 1867; Worcester, Mass., October 14, 1867 — all disapproving that policy, and especially the extension of the suffrage to the negro.

The platforms are given in the Tribune Almanac, 1866–1867.

[2] 1869, February 27; Globe, 1564.

longing previously to the states.[1] The fifteenth amendment did not confer the suffrage on any person; it forbids discrimination against a citizen on account of race, color, or previous condition of servitude. Excepting qualifications within these three, a state may impose any in regulating the suffrage.[2]

The civil reorganization outlined by this brief summary of the organic changes in the plan of government in America from 1865 to 1870 constitutes the most critical experiment ever made by a free people. If we inquire for the reasons for this innovation, we must turn to the principle of "equality before the law," which from the beginning was recognized as fundamental in the American system. A later generation has spoken with disapprobation of the congressional policy of reconstruction. It has been said that the Congress which executed that policy were actuated by selfish party motives; that they failed to comprehend the incapacity of the negro for citizenship, and, consequently, by making him a citizen and endowing him with the suffrage they imperilled republican institutions. This they did by forcing interracial hostility at the South.

Of the nature of public opinion in America at the close of the civil war respecting the negro, there is ample evidence. The republican party was dominant, and its creed was sacred to its members. Its faith in the capacity of the negro to do the duties of a citizen was active and immeasurable. Its humanitarianism was unbounded. The rights of man so exalted in republics, this party believed, included the negro. Participation in government, education, protection, industry, would raise the negro in the scale, even out of the awful degradation of slavery.

But there was another reason, — a reason enforced upon Congress by the overwhelming testimony of innumerable witnesses, — the testimony of the reign of crime against the negro in the South at the close of the war and for ten years thereafter. A portion of this testimony is preserved in some forty stout octavo volumes, published by Congress among the records of the government. It is

[1] Slaughter House Cases, 16 Wallace, 36. [2] See pp. 309-310.

with difficulty that one now perusing these terrible records can believe their truthfulness. The crimes perpetrated, the cruelties practised, the exquisite miseries wrought upon negroes suggest the horrors of the French revolution. Face to face with the condition of the negro, Congress, conscious of its responsibility, adopted a policy which it believed would restore order, by enabling the negro to protect himself. To do this he must be armed with the rights of citizenship. In a representative democracy like ours there was no other policy to follow. In a monarchy, or in an aristocracy, the protection of the negro might have been entrusted to a class, — as the ruling house, or the nobility. In a representative democracy each man must be a citizen and be able to protect himself.

It has been said in criticism of Congress, that in extending the suffrage to the negro the privilege might have been safeguarded by educational or property qualifications, or by both. But to impose either qualification was practically impossible. Property qualifications had been tried during the earlier years of the states, and by common consent had after some thirty years' trial been abolished.[1] The opponents of negro suffrage in 1866 did not advocate educational or property qualifications for the negro. This opposition was grounded on the theory that the negro is incapable of performing a citizen's duties. Neither property nor education would fit him for citizenship. He was a negro.

Of the reconstruction constitutions one, and one only, — that of Mississippi of 1868, — forbade an educational qualification for the negro. The South Carolina convention of that year discussed the question of imposing such a qualification, but unanimously agreed that the negro, after exclusion from civil and political rights for untold ages, now having a chance to possess the suffrage, should have it with one qualification only, — manhood.

Had Congress rejected the southern constitutions of 1867–1868 because they did not impose educational or property qualifications on the negro, and had it returned

[1] For a detailed account of these qualifications and of their abolition, see the author's "Constitutional History of the American People, 1776–1850," vol. i.

them for amendment, it must in equity have prescribed that whatever qualification was required of the negro should be required of the white man. This would have evoked a race war, for the poor whites at the South would have resented the discrimination, and the intelligent and wealthy whites would have sided with their own race. History has already exemplified this truth.

Of the selfish motives of the republican party in extending the suffrage to the negro there can be no reasonable doubt. The party considered the negro race as the ward of the nation, and believed that the nation was safest in republican hands. The astute Thaddeus Stevens plainly told Congress that it must make its work of reconstruction secure by passing the fourteenth amendment ere it was too late; and a like warning was spoken by other leaders of the party when the fifteenth amendment, its passage doubtful, was before the House. That the party in power at the close of the war sought to perpetuate its power is analogous to the conduct of every party in power at any time in the history of constitutional government.

Had the democratic party been in power, it would have refused to extend the suffrage to the negro, among other reasons, for the purpose of perpetuating its control of the government. For this selfish reason slavery was defended and strengthened by every party in power down to the election of Abraham Lincoln.

It has been said that Congress, at the close of the civil war, should have applied a policy of gradually admitting the negro to citizenship; a policy like that which, it has been said, should have been applied to the negro, — of gradual emancipation, instead of immediate and unconditional freedom. Critics living in these later days claim to understand the question better than did Congress in 1865.

One fatal element of the policy of graduated citizenship is the residuum or remainder of the negro race not admitted to citizenship. In what civil or political state would they be left? In a representative democracy there can be freemen and slaves, but can there be freemen amenable to the power in the state who are not citizens? What would be the tendency of the remainder toward free-

dom and citizenship or toward slavery? Racial hostility, if supported to any degree by law or public sentiment, forces the remainder inevitably into peonism, or toward slavery. This fact was exemplified at the South, and Congress abolished and prohibited peonism.

Slavery was an evil, and never realized as so terrible an evil until, having been abolished, the difficulties of citizenship were brought home to the former slave. An act of Congress could not transform the negro into a new creature at once. It could confer upon him a mighty privilege which even white men have been known to abuse. And it is not strange that the negro should be held to stricter accountability for his citizenship than is the white man. This is human nature, — or, at least, the white man's nature. To attempt a policy of gradual citizenship meant practically a return to slavery. There was no safe course for Congress other than to treat the negro as a man and make the best of the consequences.

Congressional reconstruction has in later years been the object of hostile criticism by academic writers, by politicians, by southern statesmen. The objections emanating from southern sources are entitled to respect, because the problem is locally a southern one. As a question of representation, it is national. Viewed as a local problem, or as a national problem, there is no conclusive evidence that Congress, and successive congresses from 1861 to 1868, violated the principles of republican government when they adopted and executed that policy which distinguishes the era of reconstruction. The stupendous problem which befell the congresses of the reconstruction era classes the statesmen of that era with the Fathers. That problem was nothing less than an adjustment of popular government to the moral order. That era stands out as distinct as the era of the revolution. In the evolution of government it will forever stand as an era of organic changes comparable in the material world to those adaptations by which new species come into being, new areas are occupied by living forms, and new vital conditions, which only the fittest survive, modify the whole after history of living things.

CHAPTER XIII

THE COMMONWEALTHS

THE war between the Confederacy and the nation was an industrial no less than a civil revolution, and was followed during the remaining years of the century by notable changes in the organic laws of the states. Eleven new states were admitted into the Union, forty-seven constitutions were adopted, and above one hundred amendments were made.[1]

In 1865 the former Confederate states responsive to the proclamations of President Johnson, adopted new constitutions for the purpose of resuming their places in the Union. These instruments excluded the negro race from the basis of representation and also from the suffrage, and on that account were rejected by Congress. In 1867–1870 these states adopted constitutions conforming to the reconstruction acts of Congress, by which discrimination on account of race, color, or previous condition of servitude was prohibited, and the paramount authority of the United States was acknowledged. The right of secession from the Union was disclaimed. These changes in the organic laws of southern states preceded the adoption of the fifteenth amendment to the national Constitution, and made its ratification possible. That amendment annulled the effect of the discriminating word "white" found in thirty-one of the thirty-seven state constitutions in force at the time.[2] This was the first and only instance in American history of a change in state

[1] From 1860 to 1870 inclusive, twenty-one constitutions; from 1870 to 1880 inclusive, thirteen constitutions; from 1880 to 1890 inclusive, eight constitutions; from 1890 to 1900 inclusive, five constitutions. For the list and that of new states, see pp. 301–302, note.

[2] 1868–1870. Five of the six constitutions which did not contain the word "white" were in New England; the sixth was Kansas.

organic laws caused by a change in the Constitution of the United States.

Reconstruction is the name given to the change in America consequent upon the admission of the negro to representation and the suffrage. Reconstruction began, in the states, with the organization of West Virginia and its adoption of a constitution in 1863 providing for gradual emancipation. Less than two years later, by amendment, it abolished slavery. Missouri decreed abolition in 1865, and was followed by Arkansas, Virginia, Louisiana, Maryland, Nevada, and Tennessee. This action made possible the adoption of the thirteenth amendment to the national Constitution, as this accession to the list of free states made the majority required to ratify an amendment [1] to the national Constitution abolishing slavery.

The bills of rights in southern reconstruction constitutions contained clauses designed to perpetuate the immediate results of the war, — as for example in Mississippi, 1868, whose bill of rights forbade educational qualifications for the elector, the evident purpose being to secure the full negro vote. An educational test would have restored the state to the exclusive control of the whites, and given the Democrats the ascendency. The extension of the suffrage to the negro was not carried without a contest, even in the free states. The former Confederate states were powerless to prevent the innovation, and reconstruction was forced upon them by federal authority. At the North the procedure was wholly different. Congress had no power to change the suffrage laws of northern states, and the reconstruction acts of 1867 did not apply to them. Though intolerant of slavery, the people in the northern states were not wholly favorable to negro suffrage. New York, in 1821, had extended the suffrage to the negro, but discriminated against him by means of a property qualification. In 1868, at the time of reconstruction, the people of this state refused, by a heavy majority, to abolish this discriminating qualification. In the preceding year, the people of Michigan rejected a new constitution which purported to confer the suffrage on the

[1] For a detailed account of reconstruction, see the author's third volume of "The Constitutional History of the United States, 1765-1895."

negro. Later, when the fifteenth amendment — the suffrage amendment — to the national Constitution was before the states for ratification, it was rejected by Oregon, California, New Jersey, and Ohio, and New York withdrew its ratification. Ohio and New Jersey later withdrew their objections. The border states, — Delaware, Maryland, Kentucky, and Tennessee, — which were unaffected by the reconstruction acts of Congress, promptly rejected the amendment. Here were nine states, of the thirty-seven comprising the Union at the time of reconstruction, hostile to negro suffrage and able to record their hostility by their treatment of the fifteenth amendment. The ten states which had belonged to the Confederacy were bitterly hostile to negro suffrage. Thus nineteen of the thirty-seven members of the Union, in 1870, were opposed to negro suffrage; the changed attitude in three — New York, New Jersey, and Ohio — being brought about by a slender majority. It might well be questioned whether, after federal troops were withdrawn from the South, and the states were each again free and independent, those hostile to negro suffrage might not adopt new constitutions which would eliminate the negro from the list of voters. In northern states the negro population was too small to compel such a constitutional change. If in any state of New England, or of the northwest, three fifths of the population had been negroes, would not the provocation to abolish negro suffrage have been the same as in South Carolina, Mississippi, or Louisiana?

Evidently the principal civil and political change wrought by the war — the reconstruction of the state governments by extending the elective franchise to the negro — rested, in some of the states, upon an unstable foundation. The absence of negroes at the North relieved that part of America of the burden of the race problem.

For thirty years the people of the southern states continued the reconstruction constitutions, passing, meanwhile, from the era of negro domination to another era of white supremacy. In 1890 Mississippi promulgated a new constitution, the ostensible purpose of which was to disfranchise the negro and to give the control of public affairs forever to the whites. The method adopted was,

in substance, the exclusion of the negro by an educational test and by registration, by which the control of elections was placed in the hands of white men. Two years later, the constitutionality of the suffrage clause was sustained by the supreme court of the state.

South Carolina followed, in 1895, with a new constitution, similar to that of Mississippi. Louisiana, in 1898, adopted a new constitution which contained a more rigorous article, excluding negroes from voting, the most elaborate provision on the suffrage thus far adopted by an American state. In addition to registration, the voter must possess an educational qualification, or in defect thereof, a property qualification. The descendants of persons who were electors on or before January, 1867, were exempted from the requirements of property or education. This is the celebrated "grandfather clause." In 1896 the North Carolina legislature submitted a similar clause to the people of that state, and in 1902 the Virginia convention promulgated a new constitution, on which it had been engaged over a year, containing a suffrage provision made after the Louisiana model. Alabama, in 1901, in a new constitution, provided for the limitation of the suffrage, in a manner analogous to that pursued in Mississippi. Thus within a single decade, six states, in which the problem of negro suffrage was a vital issue, repudiated it as far as was thought possible without violating the fifteenth amendment to the national Constitution.

The extension of the right to vote to the negro, in 1868–1870, was made with enthusiasm by the republican party, then dominant in the Union. It was a sign of the times that in 1890–1895 no political party made an issue of the repudiation of negro suffrage and the elimination of the negro from the government by southern states. Theories respecting the negro, which filled the public mind at the time of the civil war, have been quite abandoned, and the public mind is now resting in the belief that the solution of the negro problem is in the hands of the negro himself, and of the whites in those states in which the African race is a civil, political, and industrial factor. The extension of the suffrage to the negro was the most remarkable event in the civil history of America, and the administration of

negro suffrage remains one of the most difficult problems in state government. If the discussions in the conventions of the states which have in recent years attempted limited negro suffrage are indicative of public opinion at the South, the negro man who is industrious, moral, and intelligent will have no difficulty in being registered as a voter and in voting. Granting that injustice has been done to the African race, it is believed, at least in the South, that the negro himself must bear his share of the burden, which his race, in the aggregate, impose upon society.

The people of Mississippi, in their constitution of 1890, included in its bill of rights a declaration of paramount allegiance to the United States, and a disclaimer of the right of secession. No more indubitable proof of the general acceptance of national sovereignty has been afforded by any other state, unless it be by Nevada in 1864; but the constitution of this state, which while declaring the sovereignty of the nation proclaims also the right of the United States to coerce a state, was made amidst the agitation of the civil war, and its language has not been adopted by any other commonwealth. The insertion of the doctrines of national sovereignty and paramount allegiance into the bills of rights of Nevada and Mississippi suggests the permanency and importance of these doctrines; for a bill of rights becomes the receptacle for the preservation of elemental political truths.

No less significant was a clause in the Wyoming bill of rights, of 1890, which declares that civil and political rights should be conferred without respect of race or sex. It was in New York, in 1845, that the agitation to extend the suffrage to women began. Within five years it overspread adjoining states, but was checked by the conservative spirit of the times. The agitation then overspread the West, but for nearly fifty years won no remarkable success. The advocates of woman suffrage during this time won the right to elect women to school offices, in eighteen states; the right of women to vote on the liquor question, in several states, and to vote and hold any office in one state, — Wyoming. Though the agitation extended into the South, only two states — Louisiana and

Tennessee — granted women the right to hold school offices. The attitude of the South was distinctly hostile to the movement. Agitation reached its climax in 1889, when six new states in the Northwest were framing constitutions.[1] There has been less opposition to the admission of women to candidacy for office than to her admission to the suffrage.

Some new features of bills of rights, adopted in the later years of the nineteenth century, indicated the course and the character of public thoughts. Notably in the constitutions of the Northwest these signs of the times pointed the way men and things were going. Thus the declaration of the rights of labor, of the obligation of the state to protect labor and the industrial interests of the people, the declaration against monopolies and combinations of capital injurious to the public, were statements, in brief, of economic relations which, if the earlier constitutions be in evidence, were not suspected during the first century of the republic. A perusal of the bills of rights in constitutions adopted after 1865 cannot fail to establish the conviction that, as compared to the years before the civil war, the later years have been important as registers of great industrial changes.

We are prone to measure the progress of America solely by the political standards of the time. A more accurate measurement is the condition of labor from time to time. That an industrial revolution has been in progress, these organic laws attest. The insertion of industrial and economic clauses in the bills of rights indicates the importance attached to them.[2]

The limitation of legislative power was carried further than in the earlier constitutions of the century, and chiefly by the lengthening of the list of subjects on which the legislature should enact no special laws. In the constitutions framed after 1880, the list included upwards of one hundred *mala prohibita*, as exemplified by the constitutions of the states of the Northwest at the time of

[1] The ablest defence of woman suffrage was made by George William Curtis in the New York Constitutional Convention of 1867. See its Debates. Compare the discussion with that in Kentucky, 1891.

[2] See the constitutions adopted in the Northwest, 1889–1890.

their admission into the Union.[1] Evidently the people had suffered at the hands of legislatures and were struggling to prevent farther confusion in the state, such as is bred by a multiplicity of special and private acts. The principle insisted upon was that laws should have general application, and that each law should have a single purpose, plainly stated in the title. Until the adoption of this principle, the title of an act was seldom indicative of its contents; the phrase "and for other purposes" covering heterogeneous provisions.

To prevent the abuse of state credit, the constitutions framed after 1870 uniformly specified the limit of indebtedness for the state, and, in some instruments, the limit for counties and municipalities. A gross amount was named, or a ratio of taxable property. More perfect provision was made for sinking funds. In some states, public indebtedness could not be increased without the consent of the electors, and in Rhode Island [2] and Utah [3] the consent must be that of a majority of the electors who paid taxes on real property. This small step toward the revival of a property qualification recalls the constitutions of the eighteenth century.

Over-legislation had multiplied statute books and had confused public affairs. To check, if not to remedy the evil, the terms of legislatures, in many states, were made biennial, and the sessions were shortened — in some cases to sixty, and even to forty days. Extra sessions were discouraged by the provision that the members should serve without pay or for a smaller remuneration than for the regular session. During the closing days of a session no new bills could be introduced. The ancient distinction between the Houses — the exclusive power of the lower to originate money bills — was abolished, notably in the new states; and so slight was the demarcation of functions between the two Houses that the adoption of the unicameral system was discussed at length in several states.[4]

[1] See North Dakota, South Dakota, Montana, Idaho, Washington, Wyoming; also Pennsylvania, 1893; New York, 1894, etc.
[2] Amended constitution of 1842.
[3] Constitution of 1896. See also Colorado and Texas, 1876.
[4] *E. g.*, North Dakota, 1889; see Indiana Convention Debates, 1851.

The rare use of the power of impeachment and the similar character of legislative work done in the respective Houses quite obliterated from the popular mind memory of the traditional differences between House and Senate. A state may have the unicameral system in fact and the bicameral in name.

The distinctively new feature of these organic laws was their emphasis of the rights of the people to local government; that is, the government of counties, townships, and cities. These civil units had long suffered from special legislation, and were now made the object of constitutional care. Long articles now provided for their welfare, and administrative oversight was carried into detail. New official bodies were established to care for them, and their quasi-independence was guarded. Perhaps no new feature in state government is more significant than the development of local administration. As cities derive their charters from legislatures, — and a city charter is only a general law of the commonwealth, — the state constitutions throw little light on municipal affairs. Their history is one of administration.

With the more perfect understanding of local government there came the creation of numerous administrative boards and commissions, whose members were elected by the people. Local offices steadily multiplied, and the local budget swelled proportionally, as the increase of taxes duly proved. The cost of the state governments has increased more rapidly than population. Though legislative power was limited, the limitation was not so much the denial of authority as the prescriptive law that authority should be exercised. Legislatures are no less powerful to-day than they were in the eighteenth century; they are now required to make laws more in conformity to economic principles. It is the name, not the King, that has changed.

The later constitutions apply, in many details, the principle adopted before the civil war of admitting the executive to responsible participation in the public business, but with notable variation from the earlier method. It was discovered that the pardoning power, vested without restriction in the governor, was abused, and to remedy the evil, this power was confided to a board of pardons,

the governor being constituted a member. Surely this would diminish the chances that an offender would escape through the exercise of executive clemency, — thinly veiling political favoritism. Boards of pardon, by dividing responsibility, have given no better satisfaction than governors. The inroads of the democratic spirit into the domain of justice have devastated and debauched the public mind. American criminal procedure has become, too often, a travesty of justice. The criminal who at last is condemned, in open court, counts confidently on the reversal of the decision by a higher court, or by executive respite, or by a board of pardons, whose members are peculiarly exposed to political influences. The confusion of judicial, executive, and administrative functions, in criminal cases, is the principal defect in many of the later constitutions, or in the practice which has sprung up under them.

In the executive department the later differ from earlier organic acts, in the degree rather than the kind of changes made. A longer term, a higher salary, a larger power of participating in state affairs are given later governors. To be chosen governor of a great state like New York or Ohio, amidst profound political excitement, and by a narrow vote, as was Grover Cleveland, or Rutherford B. Hayes, at once raises the new executive to the rank of a presidential candidate. The power and prestige of the governor are a copy, in miniature, of that of the President. The later constitutions took from the legislature many appointments and vested them in the governor; and the numerous boards and commissions, whose duties are not local, were made appointive by the governor, or elective by the people, in about equal proportion. With the enormous growth of wealth, the American people became fond of luxury and display; habits much in evidence in the glare and lavishness of political expenditure. A close inspection of state expenditures reveals ample appropriations to maintain executive state. The governor's mansion, the bill for supplies and perquisites, and appropriations for extraordinary expenses, are signs that the chief executive of an American state, in the twentieth century, is a more portentous personage than was his predecessor in the eighteenth century.

In the judicial department democracy continued the changes introduced before the war. No new state established an appointive judiciary. The later constitutions are remarkable for the multiplicity of courts they establish, for the short term of the judges, and for the meagreness of their salaries. In many states a check on appeals was introduced by prescribing the monetary limit of jurisdiction, in civil cases, for the several inferior courts.

Pennsylvania [1] and New York,[2] when forming new constitutions, sought to combine the advantages of the appointive and elective system by instituting a long term for supreme court judges, — a term practically equivalent to one for life, but subject to popular election; but the precedent was not followed by other states. The multiplication of courts, the nomination of judges by party conventions, and the too frequent miscarriage of justice by the misuse of the jury-system and the technicalities of law, have seriously injured the reputation of American courts among the people and have demoralized society. Whether the demoralization is in the character of the people, or is due to the mere mechanics of government, may well be considered. The social fact is of the increased and increasing contempt of law and of courts.

The favorite theory of the founders of the republic, in the eighteenth century, — that of the mechanics of the state, that is, its system of "checks and balances," — has quite broken down in practice. The economic and organic state — of which earlier statesmen say nothing (and it is the state which we know) — demands something more potent than a mechanical system of checks and balances to secure either private or public welfare.

The judicial department, or function, in the American commonwealth, seems at present the one most in need of reorganization for the purpose of securing justice. The independence of the judiciary, as was pointed out long ago in "The Federalist," constitutes its essential character; and every innovation which diminishes that independence has wrought evil in public morals.

In the constitutions adopted during the thirty years

[1] 1873. [2] 1894.

before the civil war, a notable article was that on state banking and finance. On these subjects the later instruments have nothing. Since the enactment by Congress in 1863, and later, of the national banking laws, the whole subject has been removed from state jurisdiction. The repeal of the national bank acts would be followed, doubtless, by the revival of banking clauses in the state constitutions.

With the attempt to adjust primary law to social and industrial facts, the state constitutions have grown to great length and have descended to petty details. A constitution now resembles a code.[1] Amendment is easy and frequent. The rigid written constitution is thus made almost as flexible as an unwritten constitution.

It is chiefly in their administrative character that the later instruments differ from the earlier. A multiplicity of interests is the care of the supreme law; and in the effort to be explicit, the constitution is converted into an administrative code. The later instruments greatly exceed in length any of those adopted in 1776.

Federal relations are more easily deducible from the later than from the earlier constitutions, but the deduction would need the corrective of the political history of the country. No insignificant requirement of the voter now is that he be a citizen of the United States; and no insignificant element in state practice now is the requirement of all officials to swear allegiance both to the state and to the federal Constitution. In the daily administration of public affairs occur innumerable instances and constant proof of the sovereignty of the nation. This common understanding of federal relations in no way militates against the pacific and prosperous administration of strictly state affairs. At the same time the public mind apprehends to some degree the freedom and independence of each commonwealth in the Union.[2]

[1] *E. g.*, those formed after 1880.

[2] The states, named in the order in which they ratified the national Constitution, or were admitted into the Union, have framed constitutions as follows: —

Delaware, 1776, 1792, 1831, 1897; Pennsylvania, 1776, 1790, 1838, 1873; New Jersey, 1776, 1844; Georgia, 1777, 1789, 1798, 1839, 1868, 1877; Connecticut, charter, 1662; constitution, 1812; Massachusetts, 1780;

But of late years, notably since 1865, the tendency of government in America has been strong toward centralization. The peril is that of sacrificing the advantage, possessed originally and primarily, by every commonwealth in the Union, of adjusting local administration to local need. With popular conviction of the fact of such sacrifice is it likely that the cities may become more and more impatient of state control and demand self-government? Is the conviction, once held by the American people, that the autonomy of local government constitutes the basis of government in America fading into a tradition, or yielding to the dominance of the idea of centralization?

Maryland, 1776, 1851, 1864, 1867; South Carolina, 1776, 1778, 1790, 1868, 1895; New Hampshire, 1776, 1784, 1792, 1876; Virginia, 1776, 1830, 1850, 1902; New York, 1777, 1821, 1846, 1894; North Carolina, 1776, 1868, 1876; Rhode Island, charter, 1663, constitution, 1842; Vermont, admitted, March 4, 1791, free, 1776, 1786, 1793; Kentucky, June 1, 1792, slave, 1792, 1799, 1850, 1891; Tennessee, June 1, 1796, slave, 1796, 1834, 1865, 1870; Ohio, November 20, 1802, free, 1802, 1851; Louisiana, April 30, 1812, slave, 1812, 1845, 1852, 1868, 1879, 1898; Indiana, December 11, 1816, free, 1816, 1851; Mississippi, December 10, 1817, slave, 1817, 1832, 1868, 1890; Illinois, December 3, 1818, free, 1818, 1848, 1870; Alabama, December 14, 1819, slave, 1819, 1867, 1875, 1901; Maine, March 15, 1820, free, 1820; Missouri, August 10, 1821, slave, 1820, 1865, 1875; Arkansas, June 15, 1836, slave, 1836, 1868, 1874; Michigan, January 26, 1837, free, 1835, 1850; Florida, March 3, 1845, slave, 1838, 1865, 1868, 1886; Texas, December 29, 1845, slave, 1845, 1866, 1868, 1876; Iowa, December 28, 1846, free, 1846, 1857; Wisconsin, May 29, 1848, free, 1848; California, September 9, 1850, free, 1849, 1879; Minnesota, May 11, 1858, free, 1858; Oregon, February 11, 1859, free, 1859; Kansas, January 29, 1861, free, 1859; West Virginia, June 19, 1863, free, 1863, 1872; Nevada, October 31, 1864, free, 1864; Nebraska, March 1, 1867, 1875; Colorado, August 1, 1876; North Dakota, November 2, 1889; South Dakota, November 2, 1889; Montana, November 8, 1889; Washington, November 11, 1889; Idaho, July 3, 1890; Wyoming, July 10, 1890; Utah, January 4, 1896.

CHAPTER XIV

INTERPRETATION OF PRINCIPLES

UNTIL the civil war the general government was usually spoken of as the Federal Government, or the Confederacy.[1] Southern statesmen always used the term "confederacy," and the term was not uncommon with men of every party at the North. Mr. Lincoln used it in his debates with Douglas in 1858 and in a few of his earlier state papers; but as soon as the Confederacy of the southern states was formed, the term came to be applied exclusively to that organization, and was supplanted at the North by the word "nation." This word as a synonym for the government of the whole people is older than the Constitution, but it was used even as late as the outbreak of the war more or less vaguely by speakers and writers. The word "national" was struck out twenty-six times from the first draft of the Constitution, and in its place the words "government of the United States" were inserted. This indicates how feeble was the national idea in 1787.

While it is difficult to fix the exact time or occasion when the word "nation" was first employed as the synonym for the government of the American people, there is reason to believe that one of the earliest uses of the word in this sense was made by President Lincoln in 1863, in his Gettysburg address, in which he spoke of the government of the American people as that of "a new nation conceived in liberty and dedicated to the proposition that all men are created equal." Certain it is that after the Gettys-

[1] A good example of this occurs in "A Proclamation by the Governor of the State of Missouri," respecting the Missouri-Iowa boundary: "The power of arrest . . . by the terms of admission of the state of Missouri into *the confederacy of the United States*, etc." August 23, 1839. Shambaugh's "Messages and Proclamations of the Governors of Iowa," vol. i, p. 125.

burg oration [1] the word "nation" was for the first time freely used by the public, and was applied in the sense in which it is now understood. Congress in its debates, committees in their reports, the supreme court in its decisions, the press in editorials, and the people in their familiar talk, made use of the word in its new sense soon after the Gettysburg speech. Not infrequently both the word "nation" and "national," as applied to the general government, were written with a capital. During the campaign of 1876 there arose a common saying, that we had become "a Nation with a big N." Meanwhile, the terms "confederacy" and "confederation" dropped entirely out of common speech, except when reference was made to the government of the insurrectionary states in 1861, or to the League of states of 1781. Our political literature responded to the change in public thought, and was enriched by a work of great influence in its day which represented the nation as the foundation of civil order and political life in the United States.[2] Thus, the old word with its new meaning was given the most important place in our political vocabulary. It signified that the American people understood the character, the scope, and the functions of their government in a broader and more philosophical sense than ever before. This change was one of the most important results of the civil war.

The Constitution was thenceforth interpreted in conformity to the national character of the government. Tested by this character, the Confederate states, organized as a southern Confederacy, were an unlawful assembly without power to take, to hold, or to convey a valid title to any kind of property.[3] The courts which the Confederate government organized were a nullity and exercised no rightful jurisdiction;[4] and the debts or obligations which it incurred are illegal and void.[5]

The preservation of order, the maintenance of police regulations, the protection of property, the enforcement of

[1] November 19, 1863.
[2] "The Nation," by Elisha Mulford, LL.D., 1881.
[3] Sprott *v.* U. S., 8 Ct. Cl. 499; 20 Wall. 469.
[4] Hickman *v.* Jones, 9 Wall. 197.
[5] Constitution, Article XIV.

contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar and kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate states. That which occurred, or was done, in respect of such matters under the authority of these local *de facto* governments was not invalid merely because these governments were organized in hostility to the Union established by the national Constitution: because the existence of war between the United States and the Confederate states did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor did it destroy the bonds of society, nor do away with civil government or the regular administration of the laws. Transactions in the ordinary course of civil society, as organized within the enemy's territory, although they may have remotely or indirectly promoted the ends of the *de facto*, or unlawful government, organized to effect a dissolution of the Union, were without blame "except when proved to have been entered into with actual intent to further invasion or insurrection." In like manner, judicial and legislative acts in the several Confederate states should be respected by the courts, if they were not "hostile in their purpose or mode of enforcement to the authority of the national government, or did not impair the rights of citizens under the Constitution." [1]

The war forever settled the question of the right of secession. No more solemn proof of this decision can be found, unless it be the unwritten law of the land, than that afforded by the Mississippi constitution of 1890, which explicitly denies the right of secession. The war demonstrated the truth uttered by Chief-Justice Marshall forty years before the firing on Fort Sumpter, that "the United States form a single nation." [2]

Soon after the inauguration of the national government, in 1789, a struggle began, involving its relations to the states. All through the years preceding the civil war these relations were the subject of endless and acrimonious controversy. State sovereignty and national sovereignty

[1] Baldy *v.* Hunter, 171 U. S. Reports, 388 (1898).
[2] Cohens *v.* Virginia, 6 Wheaton, 264 (1821).

seemed to be the poles of our political existence. The practical answer to the questions involved was civil war, which made these relations clearer than ever before. The people of the United States, after 1861, were better able to understand the meaning of such terms as "state," "commonwealth," and "union." In 1868 the term "state," as it is used in the Constitution, was authoritatively defined as a political community of free persons, occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed.[1]

Until 1865, the union of the states had been generally considered as more or less an artificial and arbitrary relation established among them. This idea was now abandoned and the Union was understood to mean an organic relation growing out of the common origin, the mutual sympathies, the kindred principles, and the similar interests of the American people. From the nature of this origin, the Union was now considered to be indissoluble.[2] The preservation of the states and the maintenance of their governments were now recognized to be as much within the design and care of the federal Constitution as is the preservation of the Union and the maintenance of the national government. "The Constitution in all its provisions," said Chief-Justice Chase in 1868, "looks to an indestructible Union composed of indestructible states."

The old thorn of state sovereignty was withdrawn and the functions of the national government and of the governments of the states were more clearly perceived. The broad significance of Chief-Justice Marshall's opinion uttered in the early years of our national history was gradually dawning on the mind of the American people; namely, that the national and state governments are each sovereign with respect to the objects committed to it, but that neither is sovereign with respect to the objects committed to the other.[3] The darkness which had so long enshrouded the idea of state sovereignty

[1] Texas *v.* White, 7 Wallace, 700 (1868).
[2] Id.; Chancely *v.* Barley, 37 Geo. 532.
[3] McCullough *v.* Maryland, 4 Wheaton, 316 (1819); United States *v.* Cruikshank, 92 United States, 542.

vanished, and it was discovered that the sovereignty of a state resides not in the persons who fill the different departments of its government, but in the people from whom the state government emanates, and who may change it at their discretion. No lesson of the civil war was more valuable than its demonstration that sovereignty abides with the constituency and not with the agent; that it exists in the people of a state and not in a state as a political corporation.[1]

This organic and humane idea of sovereignty gave a new meaning to the term "state." It made clear that a state, in becoming a member of the Union, enters into an indissoluble relation and becomes an organic part of the nation. Because of this relation, no state can secede from the Union,[2] and ordinances of secession are absolutely null.[3] Because of this relation, secession and rebellion cannot alter the constitutional duties and obligations of a state, nor in any way change the allegiance which its people owe to the national government; nor can a state release its citizens from that allegiance, "since the state itself is but a fractional part of a magnificent whole, and in its collective capacity is only the aggregation of its individual citizens, all of whom are alike incapable of effecting their own release whether taken individually or collectively."[4] Because of the intimate and organic relation between the national government and the state governments, and because of the supremacy of the nation, Congress has plenary and paramount jurisdiction over all matters with which it is entrusted by the Constitution, and in the enforcement of its acts it may utilize state laws and state officials.[5]

As a general rule it is expedient that the operations of the state and national governments should as far as practicable be conducted separately, in order to avoid jealousies and conflicts of jurisdiction. The ruling principle

[1] Spooner *v.* McConnell, 3 McLean, 337.
[2] White *v.* Hart, 13 Wallace, 646; Sequestration Cases, 30 Texas, 688.
[3] Hawkins *v.* Filkins, 24 Arkansas, 286; Harlan *v.* State, 41 Mississippi, 556.
[4] Hood *v.* Maxwell, 1 West Virginia, 219.
[5] *Ex parte* Siebold, 100 U. S. 371 (1879).

of the Constitution is that of its paramount authority and of the obedience of every citizen of every state, whether in his individual or official capacity. Of the question of power there can be no doubt, but there may be a question of expediency, and this must be settled from time to time as Congress in its wisdom may determine. In other words, the civil war made clearer than before the nature and extent of the concurrent jurisdiction of the two governments. Without concurrent sovereignty "the national government would be nothing but an advisory government, and its executive power absolutely nullified." [1] Thus the true doctrine was worked out that though the states are sovereign as to all matters which have not been granted to the jurisdiction of the nation, the constitutions and laws made under and according to the Constitution are the supreme law of the land, — a truth which, it has been well said, is "the fundamental principle on which the authority of the Constitution is based." [2]

The abolition of slavery and the adoption of the thirteenth, fourteenth, and fifteenth amendments greatly changed the organization of American government as respecting the rights of the people; that is, the basis of representation and the exercise of the elective franchise. The utmost effect of the thirteenth amendment was to declare the colored race as free as the white, but it gave that race nothing more than its freedom.[3] It forever deprived the state and the national governments of the power to reduce any person to the condition of slavery or involuntary servitude, except as a punishment for crime,[4] and it made all former slaves citizens of the United States.[5] South Carolina and Florida expressed the fear, when they ratified this amendment, that Congress would use its power to enforce the article to extend the elective franchise to the negro and to interfere in the police regulations of a state. But the power of enforcing the article was not given, nor could it be exercised for this purpose,

[1] *Ex parte* Siebold, 100 U. S. 371 (1879).
[2] Id.; also Tarble's case, 12 Wall. 397 (1871).
[3] Bowlin *v.* Commonwealth, 2 Bush. 5.
[4] People *v.* Washington, 28 California, 658.
[5] U. S. *v.* Rhodes, 1 Abbot, U. S. 28.

for it gave no authority to Congress to usurp the authority of the state governments.[1]

The fourteenth amendment defined for the first time who are citizens of the United States and of a state. But persons may be citizens of the one government without being citizens of the other.[2] The amendment did not include Indians, but an Indian who is taxed and has severed his tribal relations is a citizen.[3] The main purpose of the amendment was to establish the citizenship of the negro,[4] and to protect the privileges and immunities of citizens of the United States from hostile legislation by the states,[5] therefore it is a restraint on the states, limiting the exercise of their powers which can affect the individual or his property.[6] It did not confer the right of citizenship on Chinamen, except such as are born in the United States,[7] and it has not been decided that a Chinaman born in America can become a citizen.

Though prohibiting the abridgment of the privileges of citizens of the United States, it does not forbid the abridgment of these privileges as those of citizens of states, for it was not intended to invade the right of a state to regulate the privileges and immunities of its own citizens.[8] For this reason that portion of the civil rights law which attempted to protect the privileges of citizens as to equal accommodations at places of amusement at inns, similar public places, and in public conveyances, was unconstitutional and not within the powers of Congress.[9] It is by this amendment that the states are prohibited from denying to any person within their jurisdiction "the equal protection of the law"; by which phrase is meant an equal right to resort to the courts for the redress of

[1] U. S. *v.* Cruikshank, 92 U. S. 543; 1 Woods, 308; U. S. *v.* Harris, 106 U. S. 629; State *v.* Rash, 1 Houston, Delaware Criminal Reports, 271.
[2] Slaughter House Cases, 16 Wall. 74; U. S. *v.* Cruikshank, 92 U. S. 543, 1 Woods, 308.
[3] U. S. *v.* Elm, 23 Int. Rev. Rec. 419.
[4] Slaughter House Cases, 16 Wall. 36.
[5] U. S. *v.* Harris, 106 U. S. 629.
[6] San Mateo Co. *v.* Southern Pacific R. R. Co., 8 Sawyer, 238.
[7] State *v.* Ah Chew, 16 Nevada, 51.
[8] *Ex parte* Kinney, 3 Hughes, 1; Green *v.* The State, 58 Arkansas, 190.
[9] Civil Rights Cases, 3 Supreme Court Report, 18, 33; *per contra*, U. S. *v.* Newcomer, 11 Philadelphia, 519.

wrongs, the enforcement of rights, and the exemption from unequal burdens or exactions of any kind. This equal protection is denied when taxation is not uniform and equal and when the law does not require both uniformity in the rate and in the mode of assessment.[1]

The fourteenth amendment in securing citizenship for the colored race did not confer on that race privileges or immunities not enjoyed by the white race. It gave the negro citizenship, but citizenship does not imply the possession of all political rights,[2] for the elective franchise is not a natural right or an immunity.[3] It declared that all persons born in the United States are citizens; but the amendment was not self-executing, and did not make the persons for whom it was primarily designed, voters.[4] It made clear that Congress can legislate in protection of the rights only of citizens of the United States as such citizens and not as citizens of a state.[5]

The amendment was not intended to transfer the protection of all civil rights to the national government nor to bring within the jurisdiction of Congress the entire domain of civil rights which had before belonged exclusively to the states.[6] The protection of life and personal liberty in America rests in the states alone,[7] but the provision in the fourteenth amendment, which empowers Congress to enforce it, brings within the jurisdiction of the national government atrocity, private outrage, or intimidation in any form growing out of the relation between the black and white races.[8] And in case a state does not conform in its laws to the requirements of the amendment, Congress may authorize its enforcement by suitable legislation.[9] The legislation authorized, how-

[1] Railroad Tax Cases, 13 Federal Reporter, 722; 18 Federal Reporter, 385.
[2] People *v.* De La Guerra, 40 Cal. 311.
[3] Minor *v.* Happersett, 21 Wall. 162; U. S. *v.* Cruikshank, 92 U. S. 542; Van Valkenburg *v.* Brown, 43 Cal. 43.
[4] Spencer *v.* Board, 1 McArthur, 169.
[5] U. S. *v.* Cruikshank, 92 U. S. 560; Culley *v.* Baltimore and Ohio Railroad, 1 Hughes, 536.
[6] Slaughter House Cases, 16 Wall. 36.
[7] U. S. *v.* Cruikshank, 92 U. S. 542; 1 Woods, 308.
[8] Id.
[9] U. S. *v.* Harris, 106 U. S. 629.

ever, is corrective in character, and must be such as may be necessary for restraining or correcting the effects of state laws in conflict with the amendment.[1] Thus the large meaning of the amendment, in so far as affecting United States citizenship, consisted in placing that citizenship under the protection of the national government.

The fifteenth amendment did not confer the right of suffrage on any person,[2] but invested every citizen of the United States with a new right, which it is within the power of Congress to protect.[3] The amendment is in some respects peculiar in that it is expressed in the negative form. It took away from the states the authority to discriminate against citizens of the United States on account of either race, color, or previous condition of servitude, and as by the fourteenth amendment colored persons are citizens of the United States equally with whites, so by the fifteenth discrimination against them was equally forbidden. But with the exception of discrimination on account of race, color, or previous condition of servitude, a state may prescribe such restrictions or qualifications for the exercise of the suffrage as it may think best.[4]

In nearly every state constitution in force at the time of the adoption of the fifteenth amendment, the words "white male" were a legal description of the elector. The amendment annulled the discriminating word "white" and thus affected the constitutions of northern as well as of southern states. By the obliteration of this discriminating word, the negro was left to enjoy the same rights as white persons. If a state should adopt a constitutional provision, giving the right to vote exclusively to white persons, the fifteenth amendment would operate practically to confer the right to vote on the negro, and Congress has power to protect and enforce this right.[5] It is a somewhat curious fact that the discriminating

[1] Civil Rights Cases, 3 Supreme Court Reporter, 18.

[2] Minor *v.* Happersett, 21 Wall. 178 (1874); U. S. *v.* Cruikshank, 92 U. S. 555; 1 Woods, 308; U. S. *v.* Reese, 92 U. S. 214; Anthony *v.* Haldeman, 7 Kansas, 50; Hedgman *v.* State, 26 Michigan, 51.

[3] *In re* Reese and Cruikshank, as above.

[4] Van Valkenburg *v.* Brown, 43 Cal. 43.

[5] U. S. *v.* Reese, 92 U. S. 214.

word "white" was still found in the constitutions of eight northern and of two border states[1] at the close of the nineteenth century, but it was meaningless as a discriminating word, and should these states adopt new constitutions it would be omitted. Another change of no small importance was effected by the fifteenth amendment in American government, — that Congress has power to protect citizens in those rights which are created by it or which are dependent upon it.[2]

But a corporation is not a citizen within the meaning of the fourteenth amendment, and does not possess the privileges and immunities secured to citizens against state legislation.[3] The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Constitution against the power of the federal government.[4] The right to vote for members of Congress is not derived merely from the constitutions and laws of the state in which they are chosen, but has its foundations in the Constitution and laws of the United States.[5]

The character of later constitutional interpretation has been well exemplified by the platforms of political parties. In 1868 the democratic party pronounced all the reconstruction acts of Congress "unconstitutional, revolutionary and void," and at the same time the Republicans congratulated the country on the assured success of this reconstruction policy as shown by the adoption of constitutions in most of the late insurrectionary states, "securing equal civil and political rights to all." It was in this platform of 1868, on which Grant and Colfax were nominated, that the words "nation" and "national" were for the first time spelled with a capital letter. The republican platform of 1872, on which Grant was renominated, repeated this use of the word "nation," but the democratic platform of the same year, adopted at Louis-

[1] Ohio, 1851; Indiana, 1851; Michigan, 1850; Iowa, 1857; Wisconsin, 1848; Minnesota, 1858; Oregon, 1859; Nevada, 1864; Maryland, 1867; Kentucky, 1850–1890.

[2] U. S. *v.* Reese, 92 U. S. 214.

[3] Orient Insurance Co. *v.* Daggo, 172 U. S. Reports, 537 (1898).

[4] Maxwell *v.* Dow, 176 U. S. Reports, 595 (1899).

[5] Wiley *v.* Sinkler, 179 U. S. Reports, 62 (1900).

ville, Kentucky, used the old term, "Federal Union." The democratic and republican platforms of 1876 again presented the same contrast. In 1872 the Republicans pronounced strongly for the enforcement of the thirteenth, fourteenth, and fifteenth amendments, but no reference was made to these amendments in the platform of their opponents. But in 1876 the platform on which Tilden and Hendricks were nominated affirmed the devotion of the democratic party to the Constitution, "with its amendments universally accepted as a final settlement of the controversies that engendered civil war."

It was in 1876, the centennial of American independence, that a political party for the first time proclaimed that "the United States is a nation, not a league"; and in the same clause the Republicans referred to our dual civil system as "the combined workings of national and state governments." This was a new idea, though now clear enough to us, in the evolution of the government from the beginning, but not realized until after the civil war. The changes through which the country has passed are nowhere more expressively indicated than in the saying that the United States of America is a nation, not a league. It may be contrasted to the declaration of the platform on which Buchanan and Breckenridge were elected in 1856, that the democratic party would abide by the principle laid down in the Kentucky and Virginia resolutions of 1798, and that it adopted them as the main foundations of its political creed. Throughout the evolution of American government the two ideas which stand in sharpest contrast, and between which there is a bridgeless gulf, are the doctrines of 1898 and the principles of national sovereignty.

It may be said that the later interpretation of the Constitution has tended to enlarge the jurisdiction of the United States far beyond the limits assigned it by our earlier statesmen. Many decisions might be cited in proof of this; a few will suffice. The extraordinary stimulus which the war gave to every kind of industry easily accustomed the American people to look with tolerance upon this extended jurisdiction. An illustration of this is afforded by the legal-tender cases.

In February, 1862, and by subsequents acts, Congress empowered the Secretary of the Treasury to issue United States notes, making them a legal tender. They fluctuated greatly in value, but circulated among the people as money. By many they were classed, though erroneously, with gold and silver coin. The court of appeals of the city of New York decided that they were money, and taxable as cash, but in the December term, 1868, this decision was reversed by the supreme court of the United States,[1] which held that the notes, or, as they were commonly called, "greenbacks," were securities, but not money. Meanwhile another case involving the legal-tender quality of the notes reached the supreme court from Kentucky. The opinion was delivered by Chief-Justice Chase in 1869.[2]

The court consisted of eight members, five of whom held that in as much as the act of 1862, by construction, declared these notes to be legal tender in payment of pre-existing debts, the act was inconsistent with the principles of the Constitution, and was not a law necessary and proper for carrying into execution the powers vested in the national government. The chief-justice had been Secretary of the Treasury at the time of the passage of the law, and was, indeed, its author. His judicial opinion was considered a reversal of his opinion as secretary in 1862. He now held that the four hundred million dollars in paper, which had been issued under the various acts, were not made a legal tender, and that the cause of their free circulation among the people was their quality of receivability for public dues and not their quality as legal-tender notes; therefore, the acts creating them were unconstitutional. From this opinion of the chief-justice and four of his associates, Mr. Justice Miller and two of his colleagues dissented, holding that the acts were necessary and proper to execute the powers vested by the Constitution in the national government, and that Congress had the choice of means, and was empowered to use any which in its judgment might bring about the end desired.

In April, 1869, the court was enlarged so as to consist

[1] Bank *v.* Supervisor, 7 Wall. 26.
[2] Hepburn *v.* Griswold, 8 Wall. 603.

of a chief-justice and eight associate judges. Mr. Justice Grier resigned, and President Grant filled the two vacancies in the court by the appointment of Mr. William Strong, of Pennsylvania, and Mr. Joseph P. Bradley, of New Jersey. In the December term, 1870, another case involving the legal-tender quality of the notes reached the court, and was decided on the 1st of May, following.[1] The decision rendered the year before was now reversed, and the legal-tender acts were held to be constitutional, both as affecting contracts made before their enactment and those made afterward. The opinion of the minority in the former decision was now elaborated by Mr. Justice Strong as the opinion of the court. He enlarged the scope of the inquiry, and declared that the fundamental question was whether Congress could give the quality of money to United States notes. In answer, the court now asserted that Congress has power to enact, — that the promise of the government to pay money should be for the time being equivalent in value to gold and silver coin, and that a contract calling for dollars could be legally fulfilled by a tender of the promise of the government to pay dollars. From this opinion the chief-justice and Justices Nelson, Field, and Clifford dissented, holding that the decision would sustain an emission of paper currency; that the Constitution forbids any state to make anything but gold and silver a legal tender; and that the national government can constitutionally do no more than coin gold and silver, and regulate its value and that of foreign coin. The government could emit treasury notes as a means of borrowing money, but it could not make them either money or legal tender for money.

Twelve years later a third case reached the court, and the inquiry into the principle involved was carried further than before.[2] In the earlier decision[3] the legal-tender acts had been supported on the ground that they came under the power of Congress to declare war; it was the war-power which imparted a legal-tender quality to United States notes; but in the third case before the

[1] The Legal-Tender Cases, 12 Wall. 457 (1871).
[2] Juilliard *v.* Greenman, 110 U. S. 421 (1883).
[3] Hepburn *v.* Griswold, 8 Wall. 603.

court, the court considered whether such notes, issued in time of war under acts of Congress declaring them to be a legal tender in payment of private debts, and afterward, in time of peace, redeemed and paid in gold coin, at the treasury, and then reissued under the act of 1878,[1] could, under the Constitution of the United States, be a legal tender in payment of such debts.

In answering this inquiry, the court followed the reasoning of Chief-Justice Marshall as to the scope and extent of the implied powers of Congress.[2] The people of the United States, by the Constitution, had established a national government with sovereign powers, — legislative, executive, and judicial, — and Marshall's definition was now applied to its full extent. The great chief-justice had delivered a judgment, adverse to the powers of the states to issue legal-tender notes. He had sustained the power of Congress to charter a bank, whose issue circulated as money. The application of the principle which he had elucidated, as recorded in the practice of the government, now satisfied the court that the constitutional authority of Congress to provide a currency for the whole country was now firmly established.[3] This being granted, it followed that Congress might constitutionally secure the benefit of such a currency to the people by proper legislation. The prohibition in the Constitution of the emission of bills of credit by the states, and of making anything but gold and silver coin a tender in payment of debts, did not prove that a like limitation of Congress was to be inferred.

Indeed, the very limitation of state emissions was evidence that no like limitation was intended to restrain Congress. The logical and necessary consequence then was that Congress "has power to issue the obligations of the United States in such form and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments." Under the power to borrow money on the credit of the United States, Congress has

[1] Act of May 31, 1878.
[2] McCullough *v.* Maryland, 4 Wheaton, 316 (1819).
[3] Veazie Bank *v.* Fenno, 8 Wall. 533.

as broad an authority as it has over a metallic currency under the power to coin money. Congress, under the two powers of coining and borrowing money, was authorized to establish a national currency either in coin or paper, and to make either of them lawful money for all purposes. And this power of Congress to issue legal-tender notes is not a power to be exercised only in time of war, but is equally within the discretion of Congress in time of peace. The wisdom of Congress will determine when the exigency has arisen. This is a political not a judicial question. For these reasons the court sustained the constitutionality of the act of 1878, and held that treasury notes are a legal tender in payment of private debts, and can be reissued and kept in circulation.[1]

From this opinion Mr. Justice Field dissented. He reviewed the history of bills of credit in the country, and of the clause relating to the subject in the Constitution, and particularly the history of the legal-tender acts and of the act of 1878. "Why," inquired he, "should there be any restraint upon unlimited appropriations by the government for all imaginary schemes, if the printing press can furnish the money that is needed for them?" If Congress has the power to make treasury notes a legal tender, and pass as money or its equivalent, why should it not issue a sufficient amount to pay the debt of the United States? His reasoning led him to the conclusion that the decision of the court was inconsistent with the letter and spirit of the Constitution.[2]

The decision of the court on the legal-tender question was soon utilized in the platform of the national greenback party, which, in 1884, declared that the court fully vindicated the theory of the party on the right and authority of Congress to issue legal-tender notes, and demanded

[1] Juilliard *v.* Greenman, 110 U. S. 421 (October, 1883).

[2] The act of 1878 which the court pronounced constitutional expressly forbade the retirement of the treasury notes; they must be "reissued and paid out again and kept in circulation." Nearly twenty years later President Cleveland characterized this act as one which put the government in the anomalous situation of being "forced to redeem without redemption and to pay without acquittance." (Message, December 2, 1895. Richardson, vol. ix, p. 642.) This act was the "endless chain" which ran legal-tender notes into the Treasury and gold out of it.

the issue of such money in sufficient quantities to supply the actual need of trade and commerce, and also demanded that treasury notes should be substituted for national bank notes, and that the public debt be promptly paid with them.

A great governmental power was examined by the supreme court in its decision on the constitutionality of a portion of the act of Congress of 1894, providing for internal revenue, known as the income tax.[1] The cases involving the law were twice argued; first, when one justice was absent; secondly, before a fall bench. After the first hearing, the court decided that a tax on the rents or income of real estate is a direct tax within the meaning of that term as used in the Constitution, and that a tax derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the state, and its instrumentalities to borrow money, and therefore is repugnant to the Constitution. Whether the act was unconstitutional in so far as it levied an income tax on personal property[2] and thus made a direct tax, was not decided, the justices being equally divided. This was the uncertain situation in April, 1895. In May the cases were re-argued, and the decision of the court on the last point was rendered, the opinion of the court being given by Chief-Justice Fuller.[3] A direct tax, in order to be constitutional, must be apportioned according to representation. The court held that the tax on personal property, or on the income of personal property, was a direct tax, and that the tax imposed by the act of 1894 was such a tax. As it was not apportioned to representation, it was unconstitutional and void.[4] The decision, in so far as it interpreted the Constitution, sustained the earlier decisions, Chief-Justice Fuller citing several of Marshall's as the ground of exposition.[5] Citing also the

[1] Sections 27–30, act of August 27, 1894. Statutes at Large, vol. xviii, p. 553; 157 U. S. 429; 158 U. S. 601. The cases were heard in April, 1895; re-argued, May, 1895.

[2] Two per cent on yearly gains above $4000.

[3] Mellville W. Fuller, appointed Chief-Justice, 1888.

[4] From this decision four of the nine justices dissented.

[5] McCullough *v.* Maryland, 4 Wheaton, 316, 407; Gibbons *v.* Ogden, 9 Wheaton, 1, 188; Hylton *v.* U. S., 3 Dallas, 171.

opinions of Hamilton and Madison, in "The Federalist," [1] he declared that their construction of the Constitution "should not and cannot be disregarded." The unconstitutionality of the income tax clauses of the act of 1894 consisted in the method of imposing the tax. A direct tax must be apportioned according to representation.

In the presidential campaign of 1896, the democratic and the people's parties made an issue of the decision, each calling for the imposition, by Congress, of a graduated income tax, on the ground that by the existing system the burden of the support of the government fell on land, — the farming class and small land owners; corporations and the owners of capital invested in franchises escaping their share.

The Republicans, in their platform, made no allusion to the decision. The issue was, however, not a new one, having been raised by several parties, — the first time in 1880.[2]

An illustration of the trend of political thought was afforded in 1889, in the decision in the greatest of all the Utah cases, that affecting the Mormon church.[3] According to this decision, the power of Congress over the territories of the United States is general and plenary. It arises from the right to acquire the territory, and the power to make all needful rules and regulations respecting the territory or other property belonging to the United States. What Chief-Justice Marshall had long before decided [4] the court now reaffirmed, — that the power of the United States to acquire territory is derived from the treaty-making power and the power to declare and carry on war. This power to acquire territory is an incident of national sovereignty. Having obtained such territory, the United States can impose laws upon it. Congress may legislate directly for its local government, and has full and complete legislative authority over its people.

[1] "The Federalist," Nos. XXX–XXXVI.

[2] Greenback party, platform, Chicago, June 9–11, 1880; United Labor, Cincinnati, May 16, 1888; Democratic, Chicago, June 21, 1892; National People's, Omaha, July 2, 1892; Democratic, Chicago, July 8, 1896; People's, St. Louis, July 24, 1896.

[3] Mormon Church *v.* U. S., 136 U. S. 1, 42, 44.

[4] American Insurance Co. *v.* Canter, 1 Peters, 511 (1828).

By virtue of this sovereign authority, Congress annulled the charter of the Morman church, confiscated its property, and devoted it to public uses. The regulation of a territory by Congress depends, therefore, solely on its discretion.

In another Utah case the court examined still more in detail the power of Congress to regulate the domestic affairs of a territory. "The people of the United States are sovereign owners of the national territories," said Mr. Justice Matthews, "and have supreme power over them and their inhabitants.[1] In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms or in the purposes and object of the power itself; for it may well be admitted in respect to this as in every power of society over its members that it is not absolute and unlimited. But in ordaining government for the territories and the people inhabiting them, all the discretion which belongs to the legislative power is vested in Congress, and that extends beyond all controversy, to determine by law, from time to time, the form of local government in a particular territory, and the qualification of those who shall administer it. It rests with Congress to say whether in a given case any of the people resident in the territory shall participate in the election of its officers, or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the states and to the people thereof by whom that Constitution was ordained, and to whom, by its terms, all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principle of

[1] In Murphy *v.* Ramsey, 114 U. S. 44.

constitutional liberty, which restrains the agencies of government, state and national. Their political rights are franchises which they hold as privileges under the legislative discretion of the Congress of the United States."

This decision became of extraordinary interest in connection with the extension of the jurisdiction of the United States over Porto Rico, Hawaii, and the Philippines, in 1898. If the construction of the Constitution which this decision made is to regulate the government of these new acquisitions, then the American people, acting through Congress, can forbid the people of any of these new acquisitions to assemble for the purpose of political discussion to petition our government for redress of grievances, and to bear arms. Congress can provide for searches and seizures of the persons dwelling in these acquisitions, — their houses, papers, and effects, — in modes that are recognized as illegal when employed in any American commonwealth.[1]

The acquisition of the Philippine Islands raised new constitutional questions. Are the provisions of the fourteenth and fifteenth amendments to be extended to their inhabitants? Are the people of these islands citizens of the United States, and therefore entitled to all the immunities and privileges of such persons? Is manhood suffrage to be exercised by them? Does the Constitution permit the organization of a state in the sense in which the word is used in America, out of islands remote from the United States and having no ties or connection with this country?

Can Congress organize a territorial, or colonial, government of a military type for these possessions, and can it govern them in a way altogether different from that which has at any time prevailed in any other territory of the United States?

In brief, under the Constitution and laws of the United States can any place be found for a colonial system, analogous, say, to that of the British empire? Has the acquisition of the outlying possessions of the United

[1] "The People of the United States," by Simeon E. Baldwin, LL.D. Yale Law Journal, January, 1899.

States—Porto Rico, Hawaii, and the Philippines—made it necessary for the American people to depart from the policy hitherto established in the organization or territorial governments and inaugurate a civil system for dependencies?

These questions, and many others akin to them, are not yet answered. The acquisition of Porto Rico, Hawaii, and the Philippines marks the close of an era in American history. Americans recognize this fact; European critics of America make it the theme of new prophecies and new deductions concerning the world-politics of the future. A French economist has recently said: "*Avec l'année 1898 commence en réalité une periode nouvelle; les victories sur l'Espagne, le triomphe de la politique d'expansion, le triomphe de la monnaie d'or temoignent du ce changement.*" [1]

The government of the United States is slowly feeling its way toward a fixed policy of government for our outlying possessions. This is perhaps as much as can be said with safety at the present time. This policy, it must be understood, is a matter of administration; that is, of practical application of the principles on which the American government is founded. There can be no change in these principles; there may be a change in the application of the principles. For the interpretation of these principles we look to the supreme court of the United States, which, as cases involving these principles have come before it, has defined them. Cases growing out of the tariff laws of the United States and in the decision of which the powers of Congress over the Philippines and Porto Rico were set forth, reached the court in 1901.

[1] Professor Hauser, of the University of Dijon, in Bulletin de la Société des Amis de l'Université de Dijon, tome 6, No. V, Fev. 1902. See also Constitutional Questions Incident to the Acquisition and Government by the United States, of Island Territory, by Simeon E. Baldwin, LL.D., Harvard Law Review, vol. xii, p. 6; Report on the Legal Status of the Territory and Inhabitants of the Islands acquired by the United States during the War with Spain, considered with Reference to the Territorial Boundaries, the Constitution and Laws of the United States. Charles E. Magoon, Law Officer, Division of Insular Affairs, War Department, Washington, 1900.

The court laid down principles at this time, which, strictly in harmony with earlier decisions, are the basis on which civil affairs in our outlying possessions must be administered.

Congress in governing the territories is subject to the Constitution; therefore all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject.[1] The civil government of the United States cannot extend immediately or of its own force over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as commander-in-chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the appropriate political department of the government at such time and in such degree as that department may determine. The practical interpretation put by Congress upon the Constitution has long been continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when, — and so far as, — Congress shall direct. The power to acquire territory by treaty implies not only the power to govern such territory but also to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief-Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become immediately, upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are citizens and entitled to all the rights, privileges, and immunities of citizens.

In the case of Porto Rico and the Philippines the civil rights and political status of the native inhabitants is determined by Congress. In every case of the acquisition of territory by the United States, — as that of Mexico, Alaska, Porto Rico, and the Philippines, — there is an

[1] Downes *v.* Bidwell, 182 U. S. Reports, 244 (1901).

implied denial of the right of the inhabitants to American citizenship until Congress by further action signifies its assent. Grave apprehensions of danger were felt by many eminent men, at the time of the acquisition of Porto Rico and the Philippines, lest an unrestrained possession of power by Congress might lead to unjust and oppressive legislation in which the natural rights of the territories, or their inhabitants, may be engulfed in a centralized despotism. These fears, however, find no justification in the action of Congress, in the past century, nor in the conduct of the British Parliament towards its outlying possessions since the American revolution. The wisdom and discretion of Congress will determine the question.[1]

Porto Rico is a territory appurtenant and belonging to the United States, but is not a part of the United States within the revenue clauses of the Constitution. On May 1, 1900, Congress passed a tariff law, — known as the Foraker act, — imposing duties upon imports from Porto Rico. Congress could lawfully impose a duty upon imports from Porto Rico, notwithstanding the provision of the Constitution that all duties, imports, and excises shall be uniform throughout the United States. This conclusion was reached by the supreme court, — four of the nine justices dissenting from the opinion.

"In determining the character of a tax," said the court in its opinion, "it is important to consider whether the duty be laid for the purpose of adding to the revenues of the country from which the export takes place, or for the benefit of the territory into which they are imported. The Foraker act provided that whenever the legislative assembly of Porto Rico should have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, as established by Congress, and should notify the President, he should make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico should cease." [2]

[1] Downes *v.* Bidwell, 182 U. S. Reports, 280–281.
[2] Id. *post.*; Dooley *v.* U. S. 183 U. S. Reports, p. 151.

The fund accruing from the Porto Rico tariff constituted a separate fund, exclusively at the disposal of the President for the benefit of Porto Rico. The Porto Rico tariff is a temporary tariff. There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico, and the power of Congress with respect to the states, which is merely incident to its right to regulate commerce.[1] But to this opinion of the court four justices dissented, holding, substantially, as Mr. Justice Harlan held, that "Porto Rico became, after the ratification of the treaty with Spain (in 1899), a part of, and subject to, the jurisdiction of the United States, in respect to all its territory and people; and Congress could not thereafter impose any duty impost or excise with respect to that island and its inhabitants which departed from the rule of uniformity established by the Constitution."[1]

The court held, in another case, that Porto Rico and the Philippines were not the subject of distinction after the ratification of the treaty of April 11, 1899.[2]

The status of the outlying possessions of the United States, is therefore, according to the principles of the Constitution, as laid down by the supreme court, wholly determinable by Congress. While in theory Congress has power to establish in these territories a government different from that which it has established in other territories from time to time organized, — and doubtless, from the nature of the case Congress will establish a different government because of the condition of the people in these outlying possessions, — it does not follow that Congress will establish a government there which in any true sense can be described as a "centralized despotism." The outlook is that both in Porto Rico and in the Philippines, and especially in the latter, the government established will be of a military type for a long time to come. This type seems the only type that can be set up among a people such as inhabit the Philippine islands. From

[1] Mr. Justice Harlan, dissenting opinion, in Downes *v.* Bidwell, 182 U. S. Reports.

[2] Fourteen Diamond Rings, Emil J. Pepke Claimant *v.* U. S., 183 U. S. Reports, 176 (1901).

a constitutional point of view these islands present no special difficulty in government. Congress is no more supreme respecting them and their inhabitants than it has been respecting the territory and inhabitants acquired as Mexico or Alaska. Though each acquisition of territory by the United States, — Florida, Mexico, Alaska, Porto Rico, and the Philippines, — and other acquisitions of less magnitude have been made by treaty,[1] it is well established constitutional law that "a treaty does not incorporate territory without the consent of Congress."[2]

Congress represents but does not embody the sovereignty of the United States. The President represents that sovereignty; the supreme court represents that sovereignty; but neither President nor court embodies that sovereignty. That sovereignty is embodied in the people of the United States.

In the new era upon which the United States has entered the principles of the Constitution will, we may confidently assert, remain the same as in the past. The American system of government as outlined in the Constitution is intended, as was said of it many years ago by Chief-Justice Marshall, "to endure for ages to come." But the law of permanence is the law of adaptation; and the principles of American constitutional government, it is believed, are adaptable to the exigencies of the future.

[1] Except the Oregon country and a few islands, chiefly in the Pacific Ocean, acquired by discovery.

[2] Fourteen Diamond Rings, Emil J. Pepke, Claimant *v.* U. S., 183 U. S. Reports, 176 (1901).

CHAPTER XV

SUMMARY: THE FORCES IN THE CIVIL EVOLUTION

THE eighteenth and nineteenth centuries were, in America, an age of constitutional reform. Attention long directed to the origin and growth of the federal Constitution has in later years been directed to the origin and growth of the organic law of the several commonwealths, and the conclusion has been the same, that the supreme laws of America, finding expression in constitutions of government, have, during these centuries, slowly responded to the will of the people. That will has not always been wisest or best. The elements of imperfection which cling to all human work are plainly discernible in the body of laws which, under the name of constitutions, distinguish the civil activity of the American people. The very rigidity of a written instrument has compelled amendment in order that there might exist that correspondence of expression to fact which above all else is demanded in legislation and in the formulation of a working plan of government. From that hour in the early years of the last decade of the eighteenth century, when political parties clearly aligned themselves in America, — and the year 1792 may be taken as the time, — until this present, popular government as expressed in successive administrations, dominated by party theories, has done no more than to hasten or to delay that civil adjustment, which must ever go on in order that the state may be organized under working principles, or, which signifies the same, under political theories which for the time being men interpret as conducive to the general welfare. There is more of opportunism than philosophy in the conduct of the public business.

It is to the state constitutions that we look for evidence of attempts to make special adjustments to the exigencies

of public affairs. It is in these instruments that we find recorded the important details of that civil evolution ever going on in America. No other people ever formulated political theories in constitutional form as did the Americans in the eighteenth century. The state constitutions preceded the national Constitution and practically determined its form, its arrangement, and its style. The working scheme of a parliament is plainly visible in the details of the national Constitution which regulate the procedure of Congress, the rights and privileges of senators and representatives, and the relation of the legislature to the executive and judiciary departments of the government. These parliamentary details were nicely observed in every state before the national Constitution was made. Out of the mass of local rules and regulations the federal convention composed the provisions in the supreme law which are strictly parliamentary in their nature. This working body of rules comprises the manual of procedure, written or unwritten, which every parliamentary body must obey in order to conduct public business with efficiency.

Turning to the provisions in the national instrument regulative of the executive, a like parentage is discernible: the practice of the state executives at the time the federal convention assembled. That practice, somewhat loosely outlined in the early state constitutions, was itself the resultant of many struggles and adjustments in colonial times. Between the legislative and the executive there has ever been and there doubtless ever will be, a struggle such as Jefferson depicted in 1798: "It is now understood that two political sects have arisen within the United States: the one believing that the executive is the branch of our government which needs more support, the other, that like the analogous branch in the English government, it is already too strong for the republican parts of the Constitution; and therefore, in equivocal cases, they incline to the legislative power; the former of these are called Federalists, sometimes Aristocrats or Monocrats, and sometimes Tories, after the corresponding sect in the English government of the same definition; the latter are styled Republicans, Whigs, Jacobins, Anarchists, Disor-

ganizers, etc.; these terms are in familiar use with most persons. I believe Whig and Tory characterize the distinguishing principles of the two sects." There is a contest between legislative and executive functions because some men incline to confide the conduct of public business to one person rather than to a group of persons; to King or President rather than to Parliament or Congress. The working harmony of a written or of an unwritten constitution by which the executive and the legislative perform their respective functions is a harmony agreed upon, — a convention worked out by hard necessity, — not necessarily a final definition of civil forces, or even a precise formulation of natural relations. Government is a fiction agreed upon and as conventional as the arbitrary subdivision of nature into animal or vegetable or mineral; or as the classification of plants in botany. Yet the conviction grows that government is natural because, as the civil adjustment proceeds, from age to age, men believe that life realizes unto itself its desires in proportion as government is adapted to the nature of man. It is on this abstract proposition that all constitutions and laws rest; and the labor to realize the value of the proposition works out the perpetual adjustment of theory and form to fact.

If we turn to the provisions in the national Constitution regulating the judiciary, a like purpose and a like parentage are discernible as with the legislative and the executive. The judicial function was as clearly outlined in the early state constitutions as in the practice of the English people at home, and more clearly than in the practice of any continental nation. The founders of the first state governments simply transformed into a written constitution the judicial practices which had evolved in colonial times. Most elaborate of all statements of the time was the judiciary article in the first Maryland constitution; but the analogous article in other states exemplified the ruling canon of the hour, — to differentiate the functions of government; to make each group of functions, — legislative, executive, judicial, — clear, and as far as practicable, to give to each group its specific powers and duties, safeguarded by well-defined limits. At points

where theory must perforce yield to fact, and the artificiality of government could not be hidden, it was left to practice, and the compulsions of harmony and general interest, to organize the so-called three departments or functions as a working civil unit. And it must be acknowledged, after the tests and trials of more than a century, that the defects in the American civil system, whether state or national, have not proved incident to the presence or the absence of mere words or phrases, defining or omitting to define the precise relations of either department of government to the others. All the discords and commotions which have wrought havoc in America have originated outside of our constitutions of government. Without exception in so far as these commotions have affected our organic laws, the effect has been due to the persistent efforts of groups of men to read into the organic law an interpretation favorable to their selfish interests. The most notable adjustment thus far made in America, — the abolition of slavery and the admission of the former slave to the rights of the citizen, — exemplifies the whole procedure of civil evolution. That adjustment, that abolition, that enfranchisement would never have occurred had it not been forced by grinding necessity, just as the national organization itself, — under the form of a plan of general government expressed in a written constitution, — was the result of grinding necessity in the eighteenth century. In its large meaning, the civil war adjusted the theory of free government to the facts. It was as great a triumph for the white race as for the black. It was the victory of an idea which for ages had been working out its own expression in the civil life of men. Looking back over the long struggle which we call civilization, men please themselves with belief in the altruism of democracy; but a sterner adherence to the course of human conduct would confess that the phenomenal altruism apparently won by the American people through civil war was no more than a phase of racial adjustment in America. With the African suffered to remain in Africa, all the civil wars of christendom could not have affected his present status other than as it is in the United States. It might seem excusable

to draw the inference that violent interference with the races of men in their natural habitat compels later civil adjustments of a serious nature. From which proposition one might possibly draw the civil corollary that the Filipinos, in all probability, will never be thrust into citizenship on so wholesale a scale as were the negroes in the United States. But the operation of democratic ideas will doubtless effect adjustments in the Philippines advantageous to the native races.

These stupendous amendments of the civil organization startle men by their consequences even more than do the necessities, which seem to compel them, dismay men by their difficulty. After all, the adjustment is only an experiment; the only permanent feature being that men rarely if ever return to the dominating ideas from which they sought relief by altering or amending the supreme law. But the amendment itself is amendable; the adjustment itself subject to readjustment; for society is ever in a state of flux, and the equities of the civil state are the privileges of opportunism. Government is a perpetual process of corrections.

In our own history the elements of this process are continually in evidence. Not a year passes without its body of amendments to the organic laws of the land. Down to 1900 the states adopted one hundred and twenty-one constitutions, and to each of these, save the last, — for the proposed amendment of which time has much in store, — no fewer than three thousand amendments have, in the aggregate been offered, and to the national instrument about fifteen hundred. Few of these can be said to signify other than a transient restlessness, or an obscure or hasty attempt to remedy a supposed public evil. The elevation of the written organic law as a fetish has now for upwards of a century encouraged men to believe that in order to cure public ills it is necessary only to change the wording of the Constitution. Yet the inspection of this mass of proposed amendment, so far as inspection is now possible, leads to the conviction that only a small portion of the proposed changes were intended to effect more than what may be characterized as parliamentary details; that is, terms of office, times and methods of election, salaries,

business procedure and the like; relatively few of the proposed amendments going to the essentials of government, or doing else than merely to perpetuate present or prevailing conditions under other names. The exceptions, in proposed changes in state constitutions, — exceptions which note the existence of great civil problems unsolved, — have been exclusively administrative in character. This hint at a fourth estate in government — the administrative — is frequent in the reforms demanded after 1860. The applicability of the demand for a more effective administration of public affairs must be acknowledged when we read the administrative articles inserted in the later constitutions, especially those of western states. Our organic laws, while not losing their traditional constitutional character, are rapidly assuming administrative features which are transforming them into new instruments. The American people have learned that the chief matter of interest to them practically is not the theory of the state, but the administration of affairs.

Thus it follows that our organic laws contain rarely a definition, as, for example, do the French constitutions, but ours abound increasingly with administrative features, in which respect they approach the type of European constitutions. Doubtless government in America is defective as a matter of administration; the individualism which was enthroned in America at the time of the revolution, and which dictated the form and substance of the earlier constitutions, would not tolerate the nice administration of the public business familiar to Frenchmen, Germans, and Italians. The explanation is easy. The Americans in the eighteenth century were a homogeneous people, for civil purposes, and had abundance of room wherein to live, move, and have their being. The pressure of population, as gradually felt in America, has compelled the resort to administrative reforms. The officials in any state remain but a brief time in authority. Life tenure of office has been abolished, or, to state the fact as applicable to most of the commonwealths, has never been adopted in America. The life tenure of the judiciary in Massachusetts is a survival, and the twenty-one and fourteen-year terms for judges, in Pennsylvania and New

York, are an anomaly. The limit for executives, whether mayor, governor, or President, is four years; the limit for legislators is two or four years in the states, or two or six in the United States, according to the membership, whether of the House or the Senate. The usual tenure for judges is from five to seven years. For minor officials, that vast body to whom the local government of the country is entrusted, the term is seldom more than three years. It was thought at the time when our state governments were established that a brief official term would insure responsibility by a sort of popular education; frequent elections being believed to be educative, both for the electors and the elected. But for some reason these carefully wrought devices have failed to effect the desired end; officialism has taken unto itself a habitation and a name, and what is worse, a method, and the public business has languished. It took about eighty years of hard experience to teach the American people the futility of the device which they had trusted; whereupon they proceeded to adjust their organic laws to the facts, and inserted administrative details as the corrective of official incompetency or neglect. In other words, the American people discovered that they had constructed an effective machine for raising revenue, when they organized their legislative department, but they had neglected to construct an equally effective machine for administering the funds thus raised. It was the service of education which compelled this amendment. With the appropriation of the public lands, or portions of them, as school funds, the first realization of the need of an adequate system of administration began slowly to affect the public mind. As an immediate result, the state constitutions were revised, and a new article was inserted under the title "Education." The states then became paternal, and began the many public institutions, hospitals, asylums, reformatories, training schools, colleges, and universities, with their special departments of agriculture, applied science, and the like. Whether or not democracy is altruistic, it is undoubtedly true that it is in America. But the altruistic ventures of the states demanded vast sums of money and an effective administration of the funds. Out

of this condition of affairs grew the numberless administrative changes in the earlier constitutions; changes so marked that the later instruments differ from the earlier chiefly by the inclusion of administrative provisions.

But no amendments have as yet been made, strictly of an administrative nature, to the national Constitution, save by the adoption of three lines, in a clause thrice repeated in the Constitution (the only instance of repetition in the instrument), found at the close of the thirteenth, fourteenth, and fifteenth amendments, — a clause which might seem meaningless to many, namely, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Language of this kind seems at first superfluous in an organic law because presumption would run in favor of the construction that the inclusion of a duty is the inclusion of power to perform it. There was, however, in the three amendments with which the Constitution concludes, an administrative feature of the highest significance, and, throughout all its dealings with the questions germane to the three amendments, Congress has not failed to attempt, at least, a rational administration, or to provide for the same, in its legislation. The states, having immediately the burden of local government and administration, have been compelled to make explicit administrative provisions in their organic laws; the neglect to do so being inexcusable, as there was no lower body or political organization upon whom the burden could be laid. Thus it is that all so-called municipal or county institutions are subject to state inspection, under the compulsion of administrative needs. It follows also that of the nearly four thousand volumes of state laws a respectable portion bear directly on strictly administrative matters; yet this portion bears later dates than one might expect to find, for the greater body of strictly administrative legislation has been enacted since the civil war.

It would seem then that in the evolution of popular government in America the order was rational, if not natural, — the formulation, first of the theory of the state in a working organic law, and later, the formulation of administrative directions in order to adapt the theory to

the fact. Thus all constitutional provisions regulating private corporations, such as banks, public carriers, insurance companies, and other private corporations, — and such provisions date from the New York constitution of 1846, — are, strictly speaking, administrative in their nature, as is the legislation based on them. The first constitutions made no mention of banks, public carriers, or private corporations in general, although such bodies were in existence at the time the eighteenth century constitutions were made. At first the regulation of such corporations was entrusted to the legislatures, but the confidence of the people being misused, they sought relief by placing in the constitution of the state regulations of a permanent character with which the legislature must comply. It was believed a century ago that a constitution was a last word on government, but experience has not confirmed the belief. The American people make a new state constitution every year, though the immediate product is the work of a single commonwealth. No state escapes, nor can escape, the influence of other, and especially, of contiguous states, and there is not an instance in our constitutional history of such isolation as has enabled or encouraged the people of a state to formulate a constitution distinctly different from the constitution of some other state. This conscious, or unconscious, copying has been the natural result of the migration of population; the East sending forth its children into the West; the older states of the South thus populating the Southwest; the older states of the North, the Northwest. Mr. Tilden, in a public address, once remarked, evidently with much amusement to himself, on the ease with which a constitutional provision finds its way over the land. He relates that while a member of the New York convention of 1846, he listened, indifferently, to a proposition advocated by a member, for the regulation of banks and banking. By some inadvertence which Mr. Tilden confesses that he cannot explain, the provision, though not understood by the convention, was favorably reported and doubtless by inadvertence finally inserted in the finished constitution; "and for the same reason," remarks Mr. Tilden, "it was adopted into the constitutions of

some seven western states." Now the article thus irrationally elevated to the rank of the organic law expressed the demand of the American people for the regulation of banks and banking. The panic of 1837, engendered in a long period of irresponsible banking, had brought sharply to public attention the necessity for some regulative article. Mr. Tilden might have added that the very clause, the unreasonable course of which provoked his remarks, became, in 1863, the foundation of the national banking act, in so far as that act secures depositors in national banks.

The educational provisions inserted in the first constitution of Indiana, in 1816, may be said to be the parent of the elaborate articles on the subject in all the later western constitutions; yet Pennsylvania, in 1776, and Massachusetts, in 1780, established the precedent which Indiana followed. The local government of Kentucky was the same as that of the parent state, Virginia; and that of Tennessee, of the parent state, North Carolina. Mississippi and Alabama adhered to Carolina and Georgia models, as did Michigan and Iowa to those set by New York and Pennsylvania. California, in 1849, utilized both northern and southern precedents, and came into the Union with the first composite constitution adopted in America. Thus when we seek out the factors in our civil evolution we begin the long search for precedents, which sooner or later brings us to the work of the original states. The civil evolution here has therefore much in common with the civil evolution in the old world; the migration of races and peoples accounting for the early establishment of customs, the enactment of laws, the persistency of traditions. If America had no written constitutions, the people of the several states would nevertheless possess customs and traditions, having the force of laws, derived from older communities and introduced with the coming of settlers from the eastern portion of the country. To this law Nevada is in part an exception, as also Wyoming and Idaho, which commonwealths derived much of their civil organization from California and Oregon models. In 1889, when four new states were admitted into the Union, — the Dakotas, Montana, and Washington, and in

1890, when Idaho and Wyoming were admitted, — the novel condition was disclosed of an eastward flow of population, these new commonwealths having received large masses of population from the Pacific slope. Every year shows a less distinctively westward movement of population, the lines now crossing and intersecting, as people freely remove eastward, westward, northward, and southward; the result of which will be recorded as such causes have recorded results in the past, in composite constitutions; the organic laws of the states thus slowly approaching homogeneity. This slow change exemplifies the operation of that grand law of evolution, — that the tendency in nature is from the heterogeneous to the homogeneous, a law which works for harmony. It follows that with this slow change, or perhaps under special conditions accelerated by economic pressure and interest, the bonds of the Union became stronger and the perpetuity of the republic assured. Perhaps the law might be stated, somewhat rudely, in this fashion: that with the most perfect interchange and intercourse, — economic, social, political, — the diversities which otherwise might cause friction disappear, and the civil organization attains perfection.

In this process of gradual conformity to a common ideal, political parties serve as agencies, not as principals. They compromise the people as working political units, but they do not take the place of ideas. There seems, at present, no other means for popular government to use than parties, but they should not be confounded with the governing forces in the republic. He reads history to little profit who confuses the career of political parties with the forces which determine the course of civil affairs. Parties, like all agents, abide the will of their principals. The history of parties is indirectly the history of ideas. In the early part of this book may be found the enunciation of the first principles of government in America. Men of different parties accept "The Federalist" as the earliest formulation of these principles. Yet nowhere do the authors of "The Federalist" exalt parties as original forces in government. Indeed, it would be difficult to discover a passage in "The Federalist" which makes any

reference to parties at all. When the Constitution was in process of formation, its framers, so far as the records of their discussion show, made no account of political parties. Dr. Franklin hinted strongly in his well-known speech that the fate of the new government was identified with the administration of the powers granted to it; but he did not attribute to political parties that supreme place which, at first thought, many now assign them. A party is the means of political expression and of civil administration, but it is not to be confounded with the essentials, the principles, on which government is founded. Therefore, it follows that in tracing the evolution of popular government in America, little that is essential to the subject could be gained by an elaborate account of the career of parties. The leaders formulate the opinion of the minority or of the majority, and there is never a time when the minority may not hope to become the majority; strictly speaking, that is the only excuse which the minority has for its existence. Civil adjustments, such as are recorded, whether wisely or foolishly, in constitutional amendments, are the work of the majority, and in a government organized and conceived as is ours, there is no pacific power for securing such adjustments equal in flexibility, responsiveness, and efficiency, to the political party. Thus it follows that amendments usually go under a party name, as do the thirteenth, fourteenth, and fifteenth amendments of the national Constitution, and as usually is the case, do amendments to the state constitutions. Even the organic law itself, when subject to a general revision in a state, reflects the opinions of the dominant party, as is exemplified in the later constitutions of southern states which have dealt with the suffrage. But in every case the party is the mere organ of the majority, — of that portion of the people who exercise the greatest influence. We come therefore to the people and their ideas; and it is these which exemplify the current phase of government. That the people are deluded, partly or wholly; that unwisdom for a time prevails; that much that is done has to be undone does not invalidate the proposition that political parties are agents, not principals, in the evolution of government. Practical politics resolves

the party into a primal force, and necessarily; but the silent forces which work out social conditions operate without respect for parties. It is the first business of a political party to identify itself with the course of affairs; then it may easily persuade the unknowing that its hand is on the helm of the ship of state.

There is that about government which appalls by its mystery. No man has yet explained the order of affairs, nor the causes of conditions, nor the consequences of them. So long as human nature itself is unfathomable, the mystery will continue; only clearing away, here and there, as by common experience, after many years, a rational people come to recognize some of the conditions of peace, order, and the general welfare. Could we pierce the darkness, we might be able to anticipate adjustments which, delayed too long, or ignorantly denied, come at last, suddenly, with the affliction of war. But, happily, we are not denied the hope that the law of civil evolution but rarely operates in so terrible a manner. Whatsoever contributes to the common understanding of human rights, seems, in the last analysis, the best protection against adjustments which fail to adjust, and amendments which fail to amend.

The century and a quarter which elapsed from the first enunciation of those civil principles, on which government in America is believed to rest, to the acquisition of possessions beyond our original continental domain witnessed a continuous effort among the American people to eliminate errors from their formula of civil procedure.

The elimination of error from the formula of civil procedure in America constitutes the large task in which its composite population has been engaged since the middle of the eighteenth century. To what extent that task has been a conscious undertaking toward conventional ends is the theme of every political narrative which has been written about this country. If it were possible so to interpret the civil data as to draw forth the meaning of our organic and our administrative evolution, doubtless we might have before us a clear account of our development, analogous to the accounts which Darwin and Wallace have written of the origin and development of plants and animals.

History is not and cannot be scientific. "Method and argument," observes Sir George Otto Trevelyan, "are the essential qualities necessary for the collection, collation, and valuation of historical evidence. So far history is a science. But this method ends when the task of weighing the evidence for the facts is complete. History is not a science in the sense that it can establish causal laws of general application. All attempts have failed to discover causal laws which are certain to repeat themselves in the institutions and affairs of men. The law of gravitation may be scientifically proved. But the historical law, that starvation brings on revolution, is not proved; indeed, the opposite statement, that starvation brings on abject slavery, is equally true in the light of past events." [1]

In other words, we cannot treat history as a science because we cannot get all the facts. Tendencies may be discerned while yet we possess only a part of the facts; but our interpretation of this tendency or that is liable to error in proportion to our ignorance of all the facts. Now, after the lapse of nearly a century and a half of experience under written constitutions, — and a constitution is only a plan, or scheme of government, — we detect tendencies, as we interpret facts, that popular government in America has passed or is passing into its administrative stage; or, to express the interpretation in different words, we recognize in the attempt to administer civil principles, that we are dealing with problems which did not arise, or discover themselves, while the public mind was consciously engaged in formulating the proper organization of government under its early concept of the meaning of these principles.

An illustration will make this statement clearer. Jefferson and Hamilton stand forth more conspicuously than do any other men in our history as exponents, the one of organization, the other, of administration of popular government. Jefferson's writings abound in generalizations about human rights; Hamilton's, in administrative propositions, applying particular methods. Jefferson's mind dwelt on the vague mass of relations which, as the ages

[1] The *Independent Review*, December, 1903.

pass, men, under grinding necessity, work out and establish as human rights. Hamilton's mind moved swiftly to practical affairs; to the application of particular theorems of administration; and, necessarily, to the limitation of men to fixed courses of conduct. Jefferson has much to say of the evil of government; Hamilton is ever warning against the perils from anarchy. Jefferson trusted to natural laws and the general compulsion of the co-ordinated mass of human relations; Hamilton distrusted the capacity of men to interpret their own substantial interests, in government, and therefore devoted his energies to formulate the proper procedure of that care-taker, — Government.

For more than a hundred years the systems exemplified by these two men have been in conflict in America, and it may be said that the two systems have been in conflict among men since the birth of civilization. These two systems have been recognized under various names; but in America, during the lifetime of Jefferson and Hamilton, they received the names which, with slight variation, they have borne ever since, — democracy and federalism. Unquestionably that great body of citizens who adhere to the teachings of Jefferson, emphasize, as did he, the primal importance of civil organization, and oppose, generally speaking, attempts at interference with the natural course of affairs. On the other hand, that great body of citizens who adhere to the teachings of Hamilton, emphasize the supreme importance of administration, and advocate, generally speaking, the direction of the course of affairs. This great division of the American people is plainly apparent throughout their history as an independent nation.

It must be granted, after the facts are duly weighed, that as time passes, government, in America, changes slightly, if at all, organically, but notably, in administration. Indeed, the supreme law of the land differs, to-day, almost *toto coelo*, from the supreme law as formulated in 1787, not in language but in administrative interpretation. The thirteen verbal amendments to that law are administrative rather than organic. Economic necessity has interpreted the supreme law, and the interpre-

tation has amounted, all along, to political opportunism. In other words, the written constitution has been given the flexibility of an unwritten constitution. Whenever the letter of the Constitution has stood in the way, the letter has been changed. And the same experience has befallen the people in dealing with the local or state constitutions; but with these the difficulty has been less than with the federal instrument; so much less, indeed, that no fewer than one hundred and twenty-five state constitutions have been adopted since 1776, and these have, in the aggregate, been amended no fewer than five hundred times. This facility in amendment goes far to support Jefferson's estimate of a constitution that it is of but little more importance than a statute and can be modified almost at will.

In other words, Jefferson's theory of government was that of a very flexible organization; Hamilton's concept was that of a firmly established system of checks and balances, administered according to a closely reasoned body of administrative regulations. In practice, the American people have been engaged, since the revolution, in adapting theories of administration to theories of organization. We are still engaged in this activity. The result is that in America very few principles either of organization or of administration are considered as final, fixed, and unchangeable. A contingency may force a new resolution either of organic or of administrative elements. In wartime the process seems to be hastened, but it never ceases in time of peace. This means that the evolution of the state is a perpetual process. Whether the contingency arise out of international or domestic relations, the contemporary solution of the pressing problem is an adjustment. So the thirteenth amendment to the federal Constitution was an adjustment; so too was the fifteenth amendment; but as time passes, the completeness of the adjustment, in the case of the fifteenth amendment, is more and more in doubt. The federal courts, to whom is assigned the function of final interpretation of the law of the land, interpret the fifteenth amendment, as the years pass, more and more strictly and in conformity to the precedents established prior to the adoption of the

amendment. That is, the decisions of the federal courts on the question of negro suffrage align themselves with the trend of all the early decisions, affecting the suffrage, that its control rests with the several states. Thus one is forced to doubt that the fifteenth amendment of the federal Constitution will be sustained by the generations yet to come; and the historian of two thousand years hence may write that the government of the people of the United States is a white man's government, thus reverting to the practice of dominant races in the western world, down to the close of the civil war. This tendency to reversion to an earlier type is constant among plants and animals, and may yet be further exemplified in popular government.

The attitude of the former slave-holding states to negro suffrage illustrates the potency of a general law in nature, usually cited as that of the survival of the fittest. Certainly, since 1890, the application of this general law appears more and more complete in America; but the ebb and flow of civil affairs are as yet too imperfectly understood to warrant any anticipation of the final decision in the matter of the exercise of the suffrage by the negro in America. Practically, all things now point to the elimination of the negro from American politics; and if this elimination is to become practically complete, it means a new adjustment in administration. The administration of government as to the negroes and the administration of municipal affairs are the two most pressing problems in American civil life at the opening of the twentieth century. Yet, it may be said, neither of these was the great problem in 1776. Or, at least, neither was recognized by the American people as being the great problem of the day. That they were latent problems of course goes without saying. The elaborate attempt in the federal Constitution, as it left the hands of its framers, to establish a more perfect Union, on a representative basis composed partly of slaves and partly of freemen, hints very strongly at a recognition of the difficulties of the immediate problem; but neither the federal Constitution nor the early state constitutions give any hint of the gravity of any municipal problem, and for the reason that

America in the eighteenth century was rural, not urban, in character. It is in the gradual introduction of administrative provisions, into the state constitutions, that we are able to trace the recognition of the municipal problem. Indeed, this problem may be said to remain latent until after 1850. In that year New York City contained half a million people; Chicago, thirty thousand. The phenomenal growth of these and other American cities since the civil war, until, at the close of the nineteenth century, one-fourth of the population of the country lived in cities, indicates how swiftly and imperiously the problem of municipal government has compelled solution; yet, if we turn to the constitutions in force in 1900, in the several states, we will find only the rudimentary clauses on city government which, prior to experience, we might expect to find in the first constitutions of the preceding century. Here at least there is exemplified what appears to be a general law, in civil development, that American experience in municipal government has not accumulated sufficiently to give character to the organic laws of the country. Yet if we turn to the body of municipal ordinances, and to the lesser body of acts of legislatures, pertaining to cities, we shall discover that the problem of municipal administration has for a long time been a pressing one in America, — at least for a hundred years, — for the early city ordinances date from the opening years of the nineteenth century. Again, if we turn to the last constitutions adopted in states which contain many and large cities, we shall discover, as in the New York constitution of 1894, an article on municipal government, and here and there, in other articles, clauses affecting municipal representation, taxation, and powers.[1] In this constitution municipal interests are regulated or affected, in the last resort by no fewer than twenty-two provisions. The first constitution of the state, that of 1777, contained but one municipal regulation, — that defining an elector in the city of New York.[2]

[1] New York constitution, 1894, Article XII; Article II, section 4; sections 5, 6; Article III, sections 3, 4, 5, 18, 20, 26, 28; Article VI, sections 2, 5, 14, 15; Article VII, section 1; Article VIII, sections 10, 11, 14; Article X, section 2.

[2] Article VII, New York constitution, 1777.

It may be said that municipal regulations distinguish the last from the first state constitutions, and indicate the administrative agitation which has gone along with the development of the country socially and industrially. In so far as the government of cities has entered into the problem of civil evolution in America, the changes finally effected have been administrative rather than organic in character. Municipal government in America has fallen short on the administrative rather than on the organic side, exemplifying, without doubt, the most serious defect of the aggregate American system. There is no evidence that any of the framers of the federal Constitution believed that it would endure a hundred years. Several of them frankly declared while yet the Constitution was a fragmentary draft in their hands, that they did not believe it would last so long. Their opinion, as time has proved, was well founded. The plan of government which they formulated, and which they read into the written constitution of 1787, did not continue a year unchanged. Ten amendments were made by the 15th of June, 1790, the ratification by Rhode Island giving them the vote of the requisite nine states. The eleventh amendment went into effect January 8, 1798; the twelfth, September 25, 1804; the thirteenth, December 18, 1865; the fourteenth, July 28, 1868, and the fifteenth, March 30, 1870. But these verbal changes were as nothing to the change in the interpretation of the meaning of the Constitution. Long before the death of James Madison, in 1836, that change had come; and not a change, merely, nor here and there a timid interpretation of a passage, but a new attitude of the American people toward the whole question of federal government. With the expansion of American wealth and influence, with the attrition of political parties, with the necessary and continuous efforts of the people to adjust themselves to civil and industrial conditions, there came changes in the interpretation of the supreme law; and this change is ever going on. A hundred years hence the federal Constitution will mean whatever the American people choose to read into it. But their choice of interpretation is not wholly voluntary; it is shaped and determined by the occult forces of

human society, — forces which as yet are not measurable by us.

Is it not best then to conceive of popular government in America as subject to those laws which affect human institutions at all times and among all peoples? We are not an exceptional people; ours is not a unique destiny. In spite of us, the evolution goes on and involves us in its processes. "Society," said Cavour, long ago, "is marching with long strides toward democracy. . . . Is it a good? Is it an evil? I know little enough; but it is, in my opinion, the inevitable future of humanity."

APPENDIX

THE CONSTITUTION OF THE UNITED STATES OF AMERICA.*

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Chisholm *v.* Georgia, 2 Dall., 419; McCulloch *v.* State of Maryland et al., 4 Wh., 316; Brown et als. *v.* Maryland, 12 Wh., 419; Barron *v.* The Mayor and City Council of Baltimore, 7 Pet., 243; Lane County *v.* Oregon, 7 Wall., 71; Texas *v.* White et al., 7 Wall., 700.

ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Hayburn's Case (notes), 2 Dall., 409.

SECTION 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States and the Electors in each State

* The original draft of the Constitution, engrossed on five sheets of parchment and signed by the framers, is preserved in the Department of State, Washington, in a fireproof safe. It is in the custody of the Librarian and Keeper of the Rolls. A facsimile, somewhat reduced, is given in Carson's, *100th Anniversary of the Constitution of the United States*, vol. i.

shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

In re Green, 134 U. S., 377.

[2]No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3]*[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Veazie Bank *v.* Fenno, 8 Wall., 533; Scholey *v.* Rew, 23 Wall., 331; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.

[4]When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5]The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. [1]The Senate of the United States shall be composed of two Senators from each State, chosen by

* The clause included in brackets is amended by the fourteenth amendment, second section.

the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2]Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3]No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4]The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5]The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6]The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7]Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. [1]The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but

the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Ex parte Siebold, 100 U. S., 371; Ex parte Yarborough, 110 U. S., 651.

[2]The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

In re Loney, 134 U. S., 372.

[2]Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Anderson *v.* Dunn, 6 Wh., 204; Kilbourn *v.* Thompson, 103 U. S., 168; U. S. *v.* Bollin, 144 U. S., 1.

[3]Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4]Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Coxe *v.* M'Clenachan, 3 Dall., 478.

[2]No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. [1]All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2]Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3]Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power [1]To lay

and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Hylton *v.* United States, 3 Dall., 171; McCulloch *v.* State of Maryland, 4 Wh., 316; Loughborough *v.* Blake, 5 Wh., 317; Osborn *v.* Bank of United States, 9 Wh., 738; Weston et al. *v.* City Council of Charleston, 2 Pet., 449; Dobbins *v.* The Commissioners of Erie County, 16 Pet., 435; License Cases, 5 How., 504; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How., 299; McGuire *v.* The Commonwealth, 3 Wall., 387; Van Allen *v.* The Assessors, 3 Wall., 573; Bradley *v.* The People, 4 Wall., 459.

License Tax Cases, 5 Wall., 462; Pervear *v.* The Commonwealth, 5 Wall., 475; Woodruff *v.* Parham, 8 Wall., 123; Hinson *v.* Lott, 8 Wall., 148; Veazie Bank *v.* Fenno, 8 Wall., 533; The Collector *v.* Day, 11 Wall., 113; United States *v.* Singer, 15 Wall., 111; State Tax on Foreign-held Bonds, 15 Wall., 300; United States *v.* Railroad Company, 17 Wall., 322; Railroad Company *v.* Peniston, 18 Wall., 5; Scholey *v.* Rew, 23 Wall., 331; Springer *v.* United States, 102 U. S., 586; Legal Tender Case, 110 U. S., 421; California *v.* Central Pacific Railroad Co., 127 U. S., 1; Ratterman *v.* Western Union Telegraph Co., 127 U. S., 411; Leloup *v.* Port of Mobile, 127 U. S., 640; Field *v.* Clark, 143 U. S., 649; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.

[2]To borrow Money on the credit of the United States;

McCullough *v.* The State of Maryland, 4 Wh., 316; Weston et al. *v.* The City Council of Charleston, 2 Pet., 449; Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Cases, 2 Wall., 200; The Banks *v.* The Mayor, 7 Wall., 16; Bank *v.* Supervisors, 7 Wall., 26; Hepburn *v.* Griswold, 8 Wall., 603; National Bank *v.* Commonwealth, 9 Wall., 353; Parker *v.* Davis, 12 Wall., 457; Legal Tender Case, 110 U. S., 421.

[3]To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Gibbons *v.* Ogden, 9 Wh., 1; Brown et als. *v.* State of Maryland, 12 Wh., 419; Wilson et al. *v.* Black Bird Creek Marsh Company, 2 Pet., 245; Worcester *v.* The State of Georgia, 6 Pet., 515; City of New York *v.* Miln, 11 Pet., 102; United States *v.* Coombs, 12 Pet., 72; Holmes *v.* Jennison et al., 14 Pet., 540; License Cases, 5 How., 504; Passenger Cases, 7 How., 283; Nathan *v.* Louisiana, 8 How., 73; Mager *v.* Grima et al., 8 How., 490; United States *v.* Marigold, 9 How., 560; Cowley *v.* Board of Wardens of Port of Philadelphia, 12 How., 299; The Propeller Genesee Chief et al. *v.* Fitzhugh et al., 12 How., 443; State of Pennsylvania *v.* The Wheeling Bridge Co., 13 How., 518; Veazie et al. *v.* Moore, 14 How., 568; Smith *v.* State of Maryland, 18 How., 71; State of Pennsylvania *v.* The Wheeling and Belmont Bridge Co. et al., 18 How., 421; Sinnitt *v.* Davenport, 22 How., 227; Foster et al. *v.* Davenport et al., 22 How., 244; Conway et al. *v.* Taylor's Ex., 1 Black, 603; United States *v.* Holliday, 3 Wall., 407; Gilman *v.* Philadelphia, 3

Wall., 713; The Passaic Bridges, 3 Wall., 782; Steamship Company *v.* Port Wardens, 6 Wall., 31; Crandall *v.* State of Nevada, 6 Wall., 35; White's Bank *v.* Smith, 7 Wall., 646; Waring *v.* The Mayor, 8 Wall., 110; Paul *v.* Virginia, 8 Wall., 168; Thomson *v.* Pacific Railroad, 9 Wall., 579; Downham et al. *v.* Alexandria Council, 10 Wall., 173; The Clinton Bridge, 10 Wall., 454; The Daniel Ball, 10 Wall., 557; Liverpool Insurance Company *v.* Massachusetts, 10 Wall., 566; The Montello, 11 Wall., 411; Ex parte McNiel, 13 Wall., 236; State Freight Tax, 15 Wall., 232; State Tax on Railway Gross Receipts, 15 Wall., 284; Osborn *v.* Mobile, 16 Wall., 479; Railroad Company *v.* Fuller, 17 Wall., 560; Bartemeyer *v.* Iowa, 18 Wall., 129; The Delaware Railroad Tax, 18 Wall., 206; Peete *v.* Morgan, 19 Wall., 581; Railroad Company *v.* Richmond, 19 Wall., 584; B. and O. Railroad Company *v.* Maryland, 21 Wall., 456; The Lottawanna, 21 Wall., 558; Henderson et al. *v.* The Mayor of the City of New York, 92 U. S., 259; Chy Lung *v.* Freeman et al., 92 U. S., 275; South Carolina *v.* Georgia et al., 93 U. S., 4; Sherlock et al. *v.* Alling, adm., 93 U. S., 99; United States *v.* Forty-three Gallons of Whisky, etc., 93 U. S., 188; Foster *v.* Master and Wardens of the Port of New Orleans, 94 U. S., 246; Railroad Co. *v.* Husen, 95 U. S., 465; Pensacola Tel. Co. *v.* W. U. Tel. Co., 96 U. S., 1; Beer Co. *v.* Massachusetts, 97 U. S., 25; Cook *v.* Pennsylvania, 97 U. S., 566; Packet Co. *v.* St. Louis, 100 U. S., 423; Wilson *v.* McNamee, 102 U. S., 572; Moran *v.* New Orleans, 112 U. S., 69; Head Money Cases, 112 U. S., 580; Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196; Brown *v.* Houston, 114 U. S. 622; Walling *v.* Michigan, 116 U. S., 446; Pickard *v.* Pullman, Southern Car Co., 117 U. S., 34; Tennessee *v.* Pullman Southern Car Co., 117 U. S., 51; Spraigue *v.* Thompson, 118 U. S., 90; Morgan *v.* Louisiana, 118 U. S., 455; Wabash, St. Louis and Pacific Ry. *v.* Illinois, 118 U. S., 557; Huse *v.* Glover, 119 U. S., 543; Robbins *v.* Shelby Co. Taxing Dist., 120 U. S., 489; Corson *v.* Maryland, 120 U. S., 502; Barron *v.* Burnside, 121 U. S., 186; Fargo *v.* Michigan, 121 U. S., 230; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; Phila. and Southern S. S. Co. *v.* Penna., 122 U. S., 326; W. U. Tel. Co. *v.* Pendleton, 122 U. S., 347; Sands *v.* Manistee River Imp. Co., 123 U. S., 288; Smith *v.* Alabama, 124 U. S. 465; Willamette Iron Bridge Co., *v.* Hatch, 125 U. S., 1; Pembina Mine Co. *v.* Penna., 125 U. S., 181; Bowman *v.* Chicago Northwestern Rwy. Co., 125 U. S., 465; Western Union Tel. Co. *v.* Mass., 125 U. S., 530; California *v.* Central Pacific R. R. Co., 127 U. S., 1; Leloup *v.* Port of Mobile, 127 U. S., 640; Kidd *v.* Pearson, 128 U. S., 1; Asher *v.* Texas, 128 U. S., 129; Stoutenberg *v.* Hennick, 129 U. S., 141; Western Union Tel. Co. *v.* Alabama, 132 U. S., 472; Fritts *v.* Palmer, 132 U. S., 282; Louisville, N. O., &c., Railway *v.* Mississippi, 133 U. S., 587; Leisy *v.* Hardin, 135 U. S., 100; Lyng *v.* Michigan, 135 U. S., 161; Cherokee Nation *v.* Kansas Railway Co., 135 U. S., 641; McCall *v.* California, 136 U. S., 104; Norfolk & Western R. Rd. *v.* Pennsylvania, 136 U. S., 114; Minnesota *v.* Barber, 138 U. S., 313; Texas & Pacific Ry. Co. *v.* Southern Pacific Co., 137 U. S., 48; Brimmer *v.* Rebman, 138 U. S., 78; Manchester *v.* Mass., 139 U. S., 240; In re Rahrer, 140 U. S., 545; Pullman Palace Car Co. *v.* Penna., 141 U. S., 18; Pullman Palace Car Co. *v.* Hayward, 141 U. S., 36; Mass. *v.* West'n Union Tel. Co., 141 U. S., 40; Crutcher *v.* Kentucky, 141 U. S., 47; Henderson Bridge Co. *v.* Henderson, 141 U. S., 679; In re Garnett, 141 U. S., 1; Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217; Mishimura

Ekin *v.* U. S., 142 U. S., 651; Pacific Ex. Co. *v.* Seibert, 142 U. S., 339; Horn Silver Mining Co. *v.* New York, 143 U. S., 305; Chic. & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S., 339; Budd *v.* N. Y., 143 U. S., 517; Ficklen *v.* Shelby Co. Taxing Dist., 145 U. S., 1; Lehigh Valley R. Rd. *v.* Pennsylvania, 145 U. S., 192; Interstate Commerce Comm'n *v.* B. & O. R. Rd., 145 U. S., 264; Brennan *v.* Titusville, 153 U. S., 289; Brass *v.* Stoeser, 153 U. S., 391; Ashley *v.* Ryan, 153 U. S., 436; Luxton *v.* N. River Bridge Co., 153 U. S., 529; Erie R. Rd. *v.* Penna., 153 U. S., 628; Postal Tel. Cable Co. *v.* Charleston, 153 U. S., 692; Covington & Cinc'ti Bridge Co. *v.* Ky., 154 U. S., 204; Plumley *v.* Mass., 155 U. S., 461; Texas & Pacific Rwy. Co. *v.* Interstate Transfer Co., 155 U. S., 585; Hooper *v.* Calif., 155 U. S., 648; Postal Tel. Cable Co. *v.* Adams, 155 U. S., 688; U. S. *v.* E. C. Knight & Co., 156 U. S., 1; Ernest *v.* Missouri, 156 U. S., 296; N. Y., L. E. & West'n *v.* Penna., 158 U. S., 431; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S., 577; Pittsburgh & So. Coal Co. *v.* La., 156 U. S., 590; Gulf, Colo. & S. F. Rwy. Co. *v.* Hefley, 158 U. S., 98; In re Debs, 158 U. S., 564.

[4]To establish an uniform Rule of Naturalization,[1] and uniform Laws on the subject of Bankruptcies throughout the United States;[2]

[2]Sturges *v.* Crowninshield, 4 Wh., 122; [2]McMillan *v.* McNeil, 4 Wh., 209; [2]Farmers and Mechanics' Bank, Pennsylvania, *v.* Smith, 6 Wh., 131; [2]Ogden *v.* Saunders, 12 Wh., 213; [2]Boyle *v.* Zacharie and Turner, 6 Pet., 348; [1]Gassies *v.* Ballon, 6 Pet., 761; [2]Beers et al. *v.* Haughton, 9 Pet., 329; [2]Suydam et al. *v.* Broadnax, 14 Pet., 67; [2]Cook *v.* Moffat et al., 5 How., 295; [1]Dred Scott *v.* Sanford, 19 How., 393.

[5]To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet., 257; Fox *v.* The State of Ohio, 5 How., 410; United States *v.* Marigold, 9 How., 560.

[6]To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Fox *v.* The State of Ohio, 5 How., 410; United States *v.* Marlgold, 9 How., 560.

[7]To establish Post Offices and post Roads;

State of Pennsylvania *v.* The Wheeling and Belmont Bridge Company, 18 How., 421; Homer *v.* U. S., 143 U. S., 207; In re Rapier, 143 U. S., 110; In re Debs, 158 U. S., 564.

[8]To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

the exclusive Right to their respective Writings and Discoveries;

Grant et al. *v.* Raymond, 6 Pet., 218; Wheaton et als. *v.* Peters, et als., 8 Pet., 591.

[9]To constitute Tribunals inferior to the supreme Court;
[10]To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

United States *v.* Palmer, 3 Wh., 610; United States *v.* Wiltberger, 5 Wh., 76; United States *v.* Smith, 5 Wh., 153; United States *v.* Pirates, 5 Wh., 184; United States *v.* Arizona, 120 U. S., 479.

[11]To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Brown *v.* United States, 8 Cr., 110; American Insurance Company et al. *v.* Canter (356 bales cotton), 1 Pet., 511; Mrs. Alexander's Cotton, 2 Wall., 404; Miller *v.* United States, 11 Wall., 268; Tyler *v.* Defrees, 11 Wall., 331; Stewart *v.* Kahn, 11 Wall., 493; Hamilton *v.* Dillin, 21 Wall., 73; Lamar, ex., *v.* Browne et al., 92 U. S., 187.

[12]To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Crandall *v.* State of Nevada, 6 Wall., 32.

[13]To provide and maintain a Navy;

United States *v.* Bevans, 3 Wh., 336; Dynes *v.* Hoover, 20 How., 65.

[14]To make Rules for the Government and Regulation of the land and naval Forces;
[15]To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Houston *v.* Moore, 5 Wh., 1; Martin *v.* Mott, 12 Wh., 19; Luther *v.* Borden, 7 How., 1; Crandall *v.* State of Nevada, 6 Wall., 35; Texas *v.* White, 7 Wall., 700.

[16]To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers,

and the Authority of training the Militia according to the discipline prescribed by Congress;

Houston *v.* Moore, 5 Wh., 1; Martin *v.* Mott, 12 Wh., 19; Luther *v.* Borden, 7 How., 1.

[17]To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

Hepburn et al. *v.* Ellzey, 2 Cr., 444; Loughborough *v.* Blake, 5 Wh., 317; Cohens *v.* Virginia, 6 Wh., 264; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet., 511; Kendall, Postmaster-General *v.* The United States, 12 Pet., 524; United States *v.* Dewitt, 9 Wall., 41; Dunphy *v.* Kleinsmith et al., 11 Wall., 610; Willard *v.* Presbury, 14 Wall., 676; Phillips *v.* Payne, 92 U. S., 130; United States *v.* Fox, 94 U. S., 315; National Bank *v.* Yankton County, 101 U. S., 129; Ft. Leavenworth R. Rd. Co. *v.* Howe, 114 U. S., 525; Benson *v.* U. S., 146 U. S., 325; Shoemaker *v.* U. S., 147 U. S., 282.

[18]To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

McCulloch *v.* The State of Maryland, 4 Wh., 316; Wayman *v.* Southard, 10 Wh., 1; Bank of United States *v.* Halstead, 10 Wh., 51; Hepburn *v.* Griswold, 8 Wall., 603; National Bank *v.* Commonwealth, 9 Wall., 353; Thomson *v.* Pacific Railroad, 9 Wall., 579; Parker *v.* Davis, 12 Wall., 457; Railroad Company *v.* Johnson, 15 Wall., 195; Railroad Company *v.* Peniston, 18 Wall., 5; Legal Tender Case, 110 U. S., 421; In re Coy, 127 U. S., 731; Stoutenburgh *v.* Hennick, 129 U. S., 141; Chinese Ex. Case, 130 U. S., 581; In re Neagle, 135 U. S., 1; St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Phelps, 137 U. S., 528; Homer *v.* U. S., 143 U. S., 570; Logan *v.* U. S., 144 U. S., 263; Fong-Yue Ting *v.* U. S., 149 U. S., 698; Lees *v.* U. S., 150 U. S., 476; Luxton *v.* North River Bridge Co., 153 U. S., 529; Erie R. Rd. *v.* Penna., 153 U. S., 628; Postal Tel. Cable Co. *v.* Charleston, 153 U. S., 692; Clune *v.* U. S., 159 U. S., 590.

SECTION 9. [1]The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress

prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Dred Scott *v.* Sanford, 19 How., 393.

[2]The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States *v.* Hamilton, 3 Dall., 17; Hepburn et al. *v.* Ellzey, 2 Cr., 445; Ex parte Bollman and Swartwout, 4 Cr., 75; Ex parte Kearney 7 Wh., 38; Ex parte Tobias Watkins, 3 Pet., 192; Ex parte Milburn, 9 Pet., 704; Holmes *v.* Jennison et al., 14 Pet., 540; Ex parte Dorr, 3 How., 103; Luther *v.* Borden, 7 How., 1; Ableman *v.* Booth and United States *v.* Booth, 21 How., 506; Ex parte Vallindigham, 1 Wall., 243; Ex parte Mulligan, 4 Wall., 2; Ex parte McCardle, 7 Wall., 506; Ex parte Yerger, 8 Wall., 85; Tarble's Case, 13 Wall., 397; Ex parte Lange, 18 Wall., 16; Ex parte Parks, 93 U. S., 18; Ex parte Karstendick, 93 U. S., 396; Ex parte Virginia, 100 U. S., 339; In re Neagle, 135 U. S., 1; In re Duncan, 139 U. S., 449.

[3]No Bill of Attainder or ex post facto Law shall be passed.

Fletcher *v.* Peck, 6 Cr., 87; Ogden *v.* Saunders, 12 Wh., 213; Watson et al. *v.* Mercer, 8 Pet., 88; Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How., 456; Locke *v.* New Orleans, 4 Wall., 172; Cummings *v.* The State of Missouri, 4 Wall., 277; Ex parte Garland, 4 Wall., 333; Drehman *v.* Stifle, 8 Wall., 595; Klinger *v.* State of Missouri, 13 Wall., 257; Pierce *v.* Carskadon, 16 Wall., 234; Holden *v.* Minnesota, 137 U. S., 483; Cook *v.* U. S., 138 U. S., 157.

[4]No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

License Tax Cases, 5 Wall., 462; Springer *v.* United States, 102 U. S., 586; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.

[5]No Tax or Duty shall be laid on Articles exported from any State.

Cooley *v.* Board of Wardens of Port of Philadelphia, 12 How., 299; Page *v.* Burgess, collector, 92 U. S., 372; Turpin *v.* Burgess, 117 U. S., 504; Pittsburgh & Southern Coal Co. *v.* Bates, 156 U. S., 577.

[6]No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How., 299; State of Pennsylvania *v.* Wheeling and Belmont Bridge Company

et al., 18 How., 421; Munn *v.* Illinois, 94 U. S., 113; Packet Co. *v.* St. Louis, 100 U. S., 413; Packet Co. *v.* Catlettsburg, 105 U. S., 559; Morgan S. S. Co. *v.* La. Board of Health, 118 U. S., 455.

[7]No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8]No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. [1]No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit;[1] make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law,[2] or Law impairing the Obligation of Contracts,[3] or grant any Title of Nobility.

[2]Calder and Wife *v.* Bull and Wife, 3 Dall., 386; [3]Fletcher *v.* Peck, 6 Cr., 87; [3]State of New Jersey *v.* Wilson, 7 Cr., 164; [3]Sturgis *v.* Crowninshield, 4 Wh., 122; [3]McMillan *v.* McNeil, 4 Wh., 209; [3]Dartmouth College *v.* Woodward, 4 Wh., 518; [3]Owings *v.* Speed, 5 Wh., 420; [3]Farmers and Mechanics' Bank *v.* Smith, 6 Wh., 131; [3]Green et al. *v.* Biddle, 8 Wh., 1; [3]Ogden *v.* Saunders, 12 Wh., 213; [3]Mason *v.* Haile, 12 Wh., 370; [3]Satterlee *v.* Matthewson, 2 Pet., 380; [3]Hart *v.* Lamphire, 3 Pet., 280; [1]Craig et al. *v.* State of Missouri, 4 Pet., 410; [3]Providence Bank *v.* Billings and Pitman, 4 Pet., 514; [1]Byrne *v.* State of Missouri, 8 Pet., 40; [2]Watson *v.* Mercer, 8 Pet., 88; [3]Mumma *v.* Potomac Company, 8 Pet., 281; [3]Beers *v.* Haughton, 9 Pet., 329; [1]Briscoe et al. *v.* The Bank of the Commonwealth of Kentucky, 11 Pet., 257; [3]The Proprietors of Charles River Bridge *v.* The Proprietors of Warren Bridge, 11 Pet., 420; [3]Armstrong *v.* The Treasurer of Athens Company, 16 Pet., 281; [3]Bronson *v.* Kinzie et al., 1 How., 311; [3]McCracken *v.* Hayward, 2 How., 608; [3]Gordon *v.* Appeal Tax Court, 3 How., 133; [3]State of Maryland *v.* Baltimore and Ohio R. R. Co., 3 How., 534; [3]Neil, Moore & Co., *v.* State of Ohio, 3 How., 720; [3]Cook *v.* Moffatt, 5 How., 295; [3]Planters' Bank *v.* Sharp et al., 6 How., 301; [3]West River Bridge Company *v.* Dix et al., 6 How., 507; [3]Crawford et al. *v.* Branch Bank of Mobile, 7 How., 279; [3]Woodruff *v.* Trapnall, 10 How., 190; [3]Paup et al. *v.* Drew, 10 How., 218; [2], [3]Baltimore and Susquehanna R. R. Co. *v.* Nesbitt et al., 10 How., 395; [3]Butler et al. *v.* Pennsylvania, 10 How., 402; [1]Darrington et al. *v.* The Bank of Alabama, 13 How., 12; [3]Richmond, etc., R. R. Co., *v.* The Louise R. R. Co., 13

How., 71; [3] Trustees for Vincennes University *v.* State of Indiana, 14 How., 268; [3] Curran *v.* State of Arkansas et al., 15 How., 304; [3] State Bank of Ohio *v.* Knoop, 16 How., 369; [2] Carpenter et al. *v.* Commonwealth of Pennsylvania, 17 How., 456; [3] Dodge *v.* Woolsey, 18 How., 331; [3] Beers *v.* State of Arkansas, 20 How., 527; [3] Aspinwall et al. *v.* Commissioners of County of Daviess, 22 How., 364; [3] Rector of Christ Church, Philadelphia, *v.* County of Philadelphia, 24 How., 300; [3] Howard *v.* Bugbee, 24 How., 461; [3] Jefferson Branch Bank *v.* Skelley, 1 Black, 436; [3] Franklin Branch Bank *v.* State of Ohio, 1 Black, 474; [3] Trustees of the Wabash and Erie Canal Company *v.* Beers, 2 Black, 448; [3] Gilman *v.* City of Sheboygan, 2 Black, 510; [3] Bridge Proprietors *v.* Hoboken Company, 1 Wall., 116; [3] Hawthorne *v.* Calef, 2 Wall., 10; [3] The Binghamton Bridge, 3 Wall., 51; [3] The Turnpike Company *v.* The State, 3 Wall., 210; [2] Locke *v.* City of New Orleans, 4 Wall., 172; [3] Railroad Company *v.* Rock, 4 Wall., 177; [3] Cummings *v.* State of Missouri, 4 Wall., 277; [2] Ex parte Garland, 4 Wall., 333; [3] Von Hoffman *v.* City of Quincy, 4 Wall., 535; [3] Mulligan *v.* Corbin, 7 Wall., 487; [3] Furman *v.* Nichol, 8 Wall., 44; [3] Home of the Friendless *v.* Rouse, 8 Wall., 430; [3] The Washington University *v.* Rouse, 8 Wall., 439; [3] Butz *v.* City of Muscatine, 8 Wall., 575; [3] Drehman *v.* Stifle, 8 Wall., 595; [3] Hepburn *v.* Griswold, 8 Wall., 603; [2] Gut *v.* The State, 9 Wall., 35; [3] Railroad Company *v.* McClure, 10 Wall., 511; [3] Parker *v.* Davis, 12 Wall., 457; [3] Curtis *v.* Whiting, 13 Wall., 68; [3] Pennsylvania College Cases, 13 Wall., 190; [3] Wilmington R. R. *v.* Reid, sheriff, 13 Wall., 264; Salt Company *v.* East Saginaw, 13 Wall., 373; [3] White *v.* Hart, 13 Wall., 646; [3] Osborn *v.* Nicholson et al., 13 Wall., 654; [3] Railroad Company *v.* Johnson, 15 Wall., 195; [3] Case of the State Tax on Foreign-held Bonds, 15 Wall., 300; [3] Tomlinson *v.* Jessup, 15 Wall., 454; [3] Tomlinson *v.* Branch, 15 Wall., 460; [3] Miller *v.* The State, 15 Wall., 478; [3] Holyoke Company *v.* Lyman, 15 Wall., 500; [3] Gunn *v.* Barry, 15 Wall., 610; [3] Humphrey *v.* Pegues, 16 Wall., 244; [3] Walker *v.* Whitehead, 16 Wall., 314; [3] Sohn *v.* Waterson, 17 Wall., 596; [3] Barings *v.* Dabney, 19 Wall., 1; [3] Head *v.* The University, 19 Wall., 526; [3] Pacific R. R. Co. *v.* Maguire, 20 Wall., 36; [3] Garrison *v.* The City of New York, 21 Wall., 196; [3] Ochiltree *v.* The Railroad Company, 21 Wall., 249; [3] Wilmington, &c., Railroad *v.* King, ex., 91 U. S., 3; [3] County of Moultrie *v.* Rockingham Ten Cent Savings Bank, 92 U. S., 631; [3] Home Insurance Company *v.* City Council of Augusta, 93 U. S., 116; [3] West Wisconsin R. R. Co. *v.* Supervisors, 93 U. S., 595; Murray *v.* Charleston, 96 U. S., 432; Edwards *v.* Kearzey, 96 U. S., 595; Keith *v.* Clark, 97 U. S., 454; Railroad Co. *v.* Georgia, 98 U. S., 357; Railroad Co. *v.* Tennessee, 101 U. S., 337; Wright *v.* Nagle, 101 U. S., 791; Stone *v.* Mississippi, 101 U. S., 814; Railroad Co. *v.* Alabama, 101 U. S., 832; Louisiana *v.* New Orleans, 101 U. S., 203; Hall *v.* Wisconsin, 103 U. S., 5; Pennyman's Case, 103 U. S., 714; Guaranty Co. *v.* Board of Liquidation, 105 U. S., 622; Greenwood *v.* Freight Co., 105 U. S., 13; Kring *v.* Missouri, 107 U. S., 221; Louisiana *v.* New Orleans, 109 U. S., 285; Gilfillan *v.* Union Canal Co., 109 U. S., 401; Nelson *v.* St. Martin's Parish, 111 U. S., 716; Chic. Life Ins. Co. *v.* Needles, 113 U. S., 574; Virginia Coupon Cases, 114 U. S., 270; Amy *v.* Shelby Co., 114 U. S., 387; Effinger *v.* Kenney, 115 U. S., 566; N. Orleans Gas Co. *v.* La. Light Co., 115 U. S., 650; N. Orleans Water Works *v.* Rivers, 115 U. S., 674; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S., 683; Fisk *v.* Jefferson Police Jury, 116

U. S., 131; Stone *v.* Farmers' Loan and Trust Co., 116 U. S., 307; Stone *v.* Ill. Central R. R. Co., 116 U. S., 347; Royall *v.* Virginia, 116 U. S., 572; St. Tammany Water Works *v.* N. Orleans Water Works, 120 U. S., 64; Church *v.* Kelsey, 121 U. S., 282; Lehigh Water Co. *v.* Easton, 121 U. S., 388; Seibert *v.* Lewis, 122 U. S., 284; N. Orleans Water Works *v.* La. Sugar Ref. Co., 125 U. S., 18; Maynard *v.* Hill, 125 U. S., 140; Jaehne *v.* N. Y., 128 U. S., 189; Denny *v.* Bennett, 128 U. S., 489; Chinese Ex. Case, 130 U. S., 588; Williamson *v.* N. J., 130 U. S., 189; Hunt *v.* Hunt, 131 U. S., clxv; Freeland *v.* Williams, 131 U. S., 405; Campbell *v.* Wade, 134 U. S., 34; Penna. R. Rd. Co. *v.* Miller, 134 U. S., 75; Hans *v.* Louisiana, 134 U. S., 1; North Carolina *v.* Temple, 134 U. S., 22; Crenshaw *v.* U. S., 134 U. S., 99; Louisiana ex rel. The N. Y. Guaranty and Indemnity Co. *v.* Steele, 134 U. S., 280; Minneapolis Eastern Rwy. Co. *v.* Minnesota, 134 U. S., 467; Hill *v.* Merchants' Ins. Co., 134 U. S., 515; Medley, petitioner, 134 U. S., 160; Cherokee Nation *v.* Kansas Ry. Co., 641; Virginia Coupon Cases, 135 U. S., 662; Mormon Church *v.* U. S., 136 U. S., 1; Wheeler *v.* Jackson, 137 U. S., 245; Holden *v.* Minnesota, 137 U. S., 483; Sioux City Street Railway Co. *v.* Sioux City, 138 U. S., 98; Cook *v.* U. S., 138 U. S., 157; Belmont Bridge Co. *v.* Wheeling Bridge Co., 138 U. S., 287; Cook County *v.* Calumet and Chicago Canal Co., 138 U. S., 635; Pennoyer *v.* McConnaughty, 139 U. S., 1; Scotland County Court *v.* Hill, 139 U. S., 41; Scott *v.* Neely, 139 U. S., 106; Essex Public Road Board *v.* Shinkle, 140 U. S., 334; Stein *v.* Bienville Water Supply Co., 141 U. S., 67; Henderson Bridge Co. *v.* Henderson, 141 U. S., 679; New Orleans *v.* N. O. Water W'ks, 142 U. S., 79; Pacific Ex. Co. *v.* Seibert, 142 U. S., 339; N. O. City & Lake R. Rd. Co. *v.* New Orleans; Winona & St. Peter R. Rd. Co. *v.* Plainview, 143 U. S., 371; Louisville Water Co. *v.* Clark, 143 U. S., 1; N. Y. *v.* Squire, 145 U. S., 175; Brown *v.* Smart, 145 U. S., 454; Baker's Exrs. *v.* Kilgore, 145 U. S., 487; Morley *v.* Lake Shore & Mich. Southern Ry. Co., 146 U. S., 162; Hamilton, Ga., Ltd., Coke Co. *v.* Hamilton, 146 U. S., 258; Wilmington & Weldon R. Rd. Co. *v.* Alsbrook, 146 U. S., 279; Butley *v.* Gorley, 146 U. S., 303; Ills. Cent. R. Rd. *v.* Ills., 146 U. S., 387; Morley *v.* Lake Shore & Mich. So. Rwy. Co., 146 U. S., 162; Hamilton Gas L't Co. *v.* Hamilton City, 146 U. S., 238; Wil. & Wel. R. R. Co. *v.* Alsbrook, 146 U. S., 279; Ill. Cent. R. Rd. Co. *v.* Illinois, 146 U. S., 387; Bier *v.* McGehee, 148 U. S., 137; Schurz *v.* Cook, 148 U. S., 397; Eustis *v.* Bolles, 150 U. S., 361; Duncan *v.* Missouri, 152 U. S., 377; Israel *v.* Arthur, 152 U. S., 355; New Orleans *v.* Benjamin, 153 U. S., 411; Eagle Ins. Co. *v.* Ohio, 153 U. S., 446; Erie R. Rd. *v.* Penna., 153 U. S., 628; Mobile & Ohio R. Rd. *v.* Tenn., 153 U. S., 486; Pittsburgh & So. Coal Co. *v.* La., 156 U. S., 590; U. S. ex rel. Siegel *v.* Thoman, 156 U. S., 353; City and Lake R. Rd. *v.* N. O., 157 U. S., 219; Central Land Co. *v.* Laidley, 159 U. S. 103; Winona & St. Peter Land Co. *v.* Minn., 159 U. S., 528.

[2]No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and

all such Laws shall be subject to the Revision and Controul of the Congress.

McCulloch *v.* State of Maryland, 4 Wh., 316; Gibbons *v.* Ogden, 9 Wh., 1; Brown *v.* The State of Maryland, 12 Wh., 419; Mager *v.* Grima et al., 8 How., 490; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How., 299; Almy *v.* State of California, 24 How., 169; License Tax Cases, 5 Wall., 462; Crandall *v.* State of Nevada, 6 Wall., 35; Waring *v.* The Mayor, 8 Wall., 110; Woodruff *v.* Perham, 8 Wall., 123; Hinson *v.* Lott, 8 Wall., 148; State Tonnage Tax Cases, 12 Wall., 204; State Tax on Railway Gross Receipts, 15 Wall., 284; Inman Steamship Company *v.* Tinker, 94 U. S., 238; Cook *v.* Pennsylvania, 97 U. S., 566; Packet Co. *v.* Keokuk, 95 U. S. 80; People *v.* Compagnie Générale Transatlantique, 107 U. S., 59; Brown *v.* Houston, 114 U. S., 622; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S., 577; Pittsburgh & So. Coal Co. *v.* La., 156 U. S., 590.

[3]No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Green *v.* Biddle, 8 Wh., 1; Poole et al. *v.* The Lessee of Fleeger et al., 11 Pet., 185; Cooley *v.* Board of Wardens of Port of Philadelphia et al., 12 How., 299; Peete *v.* Morgan, 19 Wall., 581; Cannon *v.* New Orleans, 20 Wall., 577; Inman Steam-ship Company *v.* Tinker, 94 U. S., 238; Packet Co. *v.* St. Louis, 100 U. S., 423; Packet Co. *v.* Keokuk, 95 U. S., 80; Vicksburg *v.* Tobin, 100 U. S., 430; Packet Co. *v.* Catlettsburg, 105 U. S., 559; Morgan Steamship Company *v.* Louisiana Board of Health, 118 U. S., 455; Ouachita Packet Co. *v.* Aiken, 121 U. S., 444; Huse *v.* Glover, 119 U. S., 543; Harmon *v.* Chicago, 147 U. S., 396; Va. *v.* Tenn., 148 U. S., 503; Wharton *v.* Wise, 153 U. S., 155.

ARTICLE II.

SECTION 1. [1]The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows

[2]Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office

of Trust or Profit under the United States, shall be appointed an Elector.

Chisholm, ex., *v.* Georgia, 2 Dall., 419; Leitensdorfer et al. *v.* Webb, 20 How., 176; Ex parte Siebold, 100 U. S., 271; McPherson *v.* Blacker, 146 U. S., 1.

* [The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

[3]The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[4]No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this

* This clause has been superseded by the twelfth amendment.

Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

English *v.* The Trustees of the Sailors' Snug Harbor, 3 Pet., 99.

[5] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[6] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.

[7] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

United States *v.* Wilson, 7 Pet., 150; Ex parte William Wells, 18 How., 307; Ex parte Garland, 4 Wall., 333; Armstrong's Foundry, 6

Wall., 766; The Grape Shot, 9 Wall., 129; United States *v.* Padelford, 9 Wall., 542; United States *v.* Klein, 13 Wall., 128; Armstrong *v.* The United States, 13 Wall., 152; Pargoud *v.* The United States, 13 Wall., 156; Hamilton *v.* Dillin, 21 Wall., 73; Mechanics and Traders' Bank *v.* Union Bank, 22 Wall., 276; Lamar, ex., *v.* Browne et al., 92 U. S., 187; Wallach et al. *v.* Van Riswick, 92 U. S., 202.

[2]He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Ware *v.* Hylton et al., 3 Dall., 199; Marbury *v.* Madison, 1 Cr., 137; United States *v.* Kirkpatrick, 9 Wh., 720; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet., 511; Foster and Elam *v.* Neilson, 2 Pet., 253; Cherokee Nation *v.* State of Georgia, 5 Pet., 1; Patterson *v.* Gwinn et al., 5 Pet., 233; Worcester *v.* State of Georgia, 6 Pet., 515; City of New Orleans *v.* De Armas et al., 9 Pet., 224; Holden *v.* Joy, 17 Wall., 211; Geofroy *v.* Riggs, 133 U. S., 258; Homer *v.* U. S., 143 U. S., 570; Shoemaker *v.* U. S., 147 U. S., 282.

[3]The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The United States *v.* Kirkpatrick et al., 9 Wh., 720.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Marbury *v.* Madison, 1 Cr., 137; Kendall, Postmaster-General, *v.* The United States, 12 Pet., 524; Luther *v.* Borden, 7 How., 1; The State of

Mississippi *v.* Johnson, President, 4 Wall., 475; Stewart *v.* Kahn, 11 Wall., 493; In re Neagle, 135 U. S., 1.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Chisholm, ex., *v.* Georgia, 2 Dall., 419; Stuart *v.* Laird, 1 Cr., 299; United States *v.* Peters, 5 Cr., 115; Cohens *v.* Virginia, 6 Cr., 264; Martin *v.* Hunter's Lessee, 1 Wh., 304; Osborn *v.* United States Bank, 9 Wh., 738; Benner et al. *v.* Porter, 9 How., 235; The United States *v.* Ritchie, 17 How., 525; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How., 272; Ex parte Vallandigham, 1 Wall., 243; Ames *v.* Kansas, 111 U. S., 449; In re Ross, 140 U. S., 453; McAllister *v.* U. S., 141 U. S., 174; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.

SECTION 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases Affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Hayburn's Case (note), 2 Dall., 410; Chisholm, ex., *v.* Georgia, 2 Dall., 419; Glass et al. *v.* Sloop Betsey, 3 Dall., 6; United States *v.* La

Vengeance, 3 Dall., 297; Hollingsworth et al. *v.* Virginia, 3 Dall., 378; Mossman, ex., *v.* Higginson, 4 Dall., 12; Marbury *v.* Madison, 1 Cr., 137; Hepburn et al. *v.* Ellzey, 2 Cr., 444; United States *v.* Moore, 3 Cr., 159; Strawbridge et al. *v.* Curtiss et al., 3 Cr., 267; Ex parte Bollman and Swartwout, 4 Cr., 75; Rose *v.* Himely, 4 Cr., 241; Chappedelaine et al. *v.* Dechenaux, 4 Cr., 305; Hope Insurance Company *v.* Boardman et al., 5 Cr., 57; Bank of United States *v.* Devaux et al., 5 Cr., 61; Hodgson et al. *v.* Bowerbank et als., 5 Cr., 303; Owings *v.* Norwood's Lessee, 5 Cr., 344; Durousseau *v.* The United States, 6 Cr., 307; United States *v.* Hudson and Goodwin, 7 Cr., 32; Martin *v.* Hunter, 1 Wh., 304; Colson et al. *v.* Lewis, 2 Wh., 377; United States *v.* Bevans, 3 Wh., 336; Cohens *v.* Virginia, 6 Wh., 264; Ex parte Kearney, 7 Wh., 38; Matthews *v.* Zane, 7 Wh., 164; Osborn *v.* United States Bank, 9 Wh., 738; United States *v.* Ortega, 11 Wh., 467; American Insurance Company *v.* Canter (356 bales cotton), 1 Pet., 511; Jackson *v.* Twentyman, 2 Pet., 136; Cherokee Nation *v.* State of Georgia, 5 Pet., 1; State of New Jersey *v.* State of New York, 5 Pet., 283; Davis *v.* Packard et al., 6 Pet., 41; United States *v.* Arredondo et al., 6 Pet., 691; Davis *v.* Packard et al., 7 Pet., 276; Breedlove et al. *v.* Nickolet et al., 7 Pet., 413; Brown *v.* Keene, 8 Pet., 112; Davis *v.* Packard et al., 8 Pet., 312; City of New Orleans *v.* De Armas et al., 9 Pet., 224; The State of Rhode Island *v.* The Commonwealth of Massachusetts, 12 Pet., 657; The Bank of Augusta *v.* Earle, 13 Pet., 519; The Commercial and Railroad Bank of Vicksburg *v.* Slocomb et al., 14 Pet., 60; Suydam et al. *v.* Broadnax, 14 Pet., 67; Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet., 530; Louisville, Cincinnati and Charleston Railway Company *v.* Letson, 2 How., 497; Cary et als. *v.* Curtis, 3 How., 236; Warring *v.* Clark, 5 How., 441; Luther *v.* Borden, 7 How., 1; Sheldon et al. *v.* Sill, 8 How., 441; The Propeller Genesee Chief *v.* Fitzhugh et al., 12 How., 443; Fretz et al. *v.* Ball et al., 12 How., 466; Neves et al. *v.* Scott et al., 13 How., 268; State of Pennsylvania *v.* The Wheeling, etc., Bridge Company et al., 13 How., 518; Marshall *v.* The Baltimore and Ohio R. R. Co., 16 How., 314; The United States *v.* Guthrie, 17 How., 284; Smith *v.* State of Maryland, 18 How., 71; Jones et al. *v.* League, 18 How., 76; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How., 272; Hyde et al. *v.* Stone, 20 How., 170; Irvine *v.* Marshall et al., 20 How., 558; Fenn *v.* Holmes, 21 How., 481; Moorewood et al. *v.* Erequist, 23 How., 491; Commonwealth of Kentucky *v.* Dennison, governor, 24 How., 66; Ohio and Mississippi Railroad Company *v.* Wheeler, 1 Black, 286; The Steamer Saint Lawrence, 1 Black, 522; The Propeller Commerce, 1 Black, 574; Ex parte Vallandigham, 1 Wall., 243; Ex parte Milligan, 4 Wall., 1; The Moses Taylor, 4 Wall., 411; State of Mississippi *v.* Johnson, President, 4 Wall., 475; The Hine *v.* Trevor, 4 Wall., 555; City of Philadelphia *v.* The Collector, 5 Wall., 720; State of Georgia *v.* Stanton, 6 Wall., 50; Payne *v.* Hook, 7 Wall., 425; The Alicia, 7 Wall., 571; Ex parte Yerger, 8 Wall., 85; Insurance Company *v.* Dunham, 11 Wall., 1; Virginia *v.* West Virginia, 11 Wall., 39; Coal Company *v.* Blatchford, 11 Wall., 172; Railway Company *v.* Whitton's Adm., 13 Wall., 270; Tarble's Case, 13 Wall., 397; Blyew et al. *v.* The United States, 13 Wall., 581; Davis *v.* Gray, 16 Wall., 203; Case of the Sewing Machine Companies, 18 Wall., 353; Insurance Company *v.* Morse, 20 Wall., 445; Vannevar *v.* Bryant, 21 Wall., 41; The Lottawanna, 21 Wall., 558; Gaines *v.* Fuentes et al., 92 U. S., 10; Miller *v.* Dows, 94 U. S., 444; Doyle

v. Continental Insurance Company, 94 U. S., 535; Tennessee *v.* Davis, 100 U. S., 257; Baldwin *v.* Franks, 120 U. S., 678; Barron *v.* Burnside, 121 U. S., 186; St. Louis, Iron Mountain and Southern Railway *v.* Vickers, 122 U. S., 360; Chinese Ex. Case, 130 U. S., 581; Brooks *v.* Missouri, 124 U. S., 394; New Orleans Water Works *v.* Louisiana Sugar Refining Co., 125 U. S., 18; Spencer *v.* Merchant, 125 U. S., 345; Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S., 46; Felix *v.* Scharnweber, 125 U. S., 54; Hannibal and St. Joseph R. R. *v.* Missouri River Packet Co., 125 U. S., 260; Kreiger *v.* Shelby R. R. Co., 125 U. S., 39; Craig *v.* Leitensdorfer, 127 U. S. 764; Jones *v.* Craig, 127 U. S., 213; Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265; U. S. *v.* Beebe, 127 U. S., 338; Chinese Ex. Case, 130 U. S., 581; Lincoln County *v.* Luning, 133 U. S., 529; Christian *v.* Atlantic & N. C. R. Rd. Co., 133 U. S., 233; Haus *v.* Louisiana, 134 U. S., 1; Louisiana ex rel. The N. Y. Guaranty & Indemnity Co. *v.* Steele, 134 U. S., 280; Jones *v.* U. S., 137 U. S., 202; Manchester *v.* Mass., 139 U. S., 240; In re Ross, 150 U. S., 453; In re Garnett, 141 U. S., 1; U. S. *v.* Texas, 143 U. S., 621; Cooke *v.* Avery, 147 U. S., 375; S. Pac. Co. *v.* Denton, 146 U. S., 202; Lawton *v.* Steele, 152 U. S., 133; Interstate Com. Comsn. *v.* Brinson, 154 U. S., 447.

[2]In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Chisholm, ex., *v.* Georgia, 2 Dall. 419; Wiscart et al. *v.* Dauchy, 3 Dall., 321; Marbury *v.* Madison, 1 Cr., 137; Durousseau et al. *v.* United States, 6 Cr., 307; Martin *v.* Hunter's Lessee, 1 Wh., 304; Cohens *v.* Virginia, 6 Wh., 234; Ex parte Kearney, 7 Wh., 38; Wayman *v.* Southard, 10 Wh., 1; Bank of the United States *v.* Halstead, 10 Wh., 51; United States *v.* Ortega, 11 Wh. 467; The Cherokee Nation *v.* the State of Georgia, 5 Pet., 1; Ex parte Crane et als., 5 Pet., 189; The State of New Jersey *v.* The State of New York, 5 Pet., 283; Ex parte Sibbald *v.* United States, 12 Pet., 488; The State of Rhode Island *v.* The State of Massachusetts, 12 Pet., 657; State of Pennsylvania *v.* the Wheeling, &c. Bridge Company, 13 How. 518; In Re Kaine, 14 How., 103; Ableman *v.* Booth and United States *v.* Booth, 22 How., 506; Freeborn *v.* Smith, 2 Wall., 160; Ex parte McCardle, 6 Wall., 318; Ex parte McCardle, 7 Wall., 506; Ex parte Yerger, 8 Wall., 85; The Lucy, 8 Wall., 307; The Justices *v.* Murray, 9 Wall., 274; Pennsylvania *v.* Quicksilver Company, 10 Wall., 553; Murdock *v.* City of Memphis, 20 Wall., 590; Börs *v.* Preston, 111 U. S., 252; Ames *v.* Kansas, 111 U. S., 449; Clough *v.* Curtis, 134 U. S., 361; In re Neagle, 135 U. S., 1; Mobile & Ohio R. Rd. *v.* Tenn., 153 U. S., 486.

[3]The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed;

but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Ex parte Milligan, 4 Wall., 2; Ellenbecker *v.* Plymouth County, 134 U. S., 31; Cook *v.* U. S., 138 U. S. 157; In re Ross, 140 U. S. 453.

SECTION 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

United States *v.* The Insurgents, 2 Dall., 335; United States *v.* Mitchell, 2 Dall., 348; Ex parte Bollman and Swartwout, 4 Cr. 75; United States *v.* Aaron Burr, 4 Cr. 469.

[2]The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Bigelow *v.* Forest, 9 Wall., 339; Day *v.* Micou, 18 Wall., 156; Ex parte Lange, 18 Wall., 163; Wallach et al. *v.* Van Riswick, 92 U. S., 202.

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Mills *v.* Duryee, 7 Cr., 481; Hampton *v.* McConnel, 3 Wh., 234; Mayhew *v.* Thatcher, 6 Wh., 129; Darby's Lessee *v.* Mayer, 10 Wh., 465; The United States *v.* Amedy, 11 Wh. 392; Caldwell et al. *v.* Carrington's Heirs, 9 Pet., 86; M'Elmoyle *v.* Cohen, 13 Pet., 312; The Bank of Augusta *v.* Earle, 13 Pet., 519; Bank of the State of Alabama *v.* Dalton, 9 How., 522; D'Arcy *v.* Ketchum, 11 How., 165; Christmas *v.* Russell, 5 Wall., 290; Green *v.* Van Buskirk, 7 Wall., 139; Paul *v.* Virginia, 8 Wall., 168; Board of Public Works *v.* Columbia College, 17 Wall., 521; Thompson *v.* Whitman, 18 Wall., 457; Bonaparte *v.* Tax Court, 104 U. S., 592; Hanley *v.* Donoghue, 116 U. S., 1; Renaud *v.* Abbott, 116 U. S. 277; Chic. and Alton R. R. *v.* Wiggins Ferry Co., 119 U. S., 615; Cole *v.* Cunningham, 133 U. S., 107; Blount *v.* Walker, 134 U. S., 607; Texas & Pacific Ry. Co. *v.* Southern Pacific Co., 137

U. S., 48; Simmons *v.* Saul, 138 U. S., 439; Reynolds *v.* Stockton, 140 U. S., 254; Carpenter *v.* Strange, 141 U. S. 87; Glenn *v.* Garth, 147 U. S., 360; Huntington *v.* Allrill, 146 U. S., 657.

SECTION 2. [1]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Bank of United States *v.* Devereux, 5 Cr., 61; Gassies *v.* Ballou, 6 Pet., 761; The State of Rhode Island *v.* The Commonwealth of Massachusetts, 12 Pet., 657; The Bank of Augusta *v.* Earle, 13 Pet., 519; Moore *v.* The People of the State of Illinois, 14 How., 13; Conner et al. *v.* Elliot et al., 18 How., 591; Dred Scott *v.* Sanford, 19 How., 393; Crandall *v.* State of Nevada, 6 Wall., 35; Woodruff *v.* Parham, 8 Wall., 123; Paul *v.* Virginia, 8 Wall., 168; Downham *v.* Alexandria Council, 10 Wall., 173; Liverpool Insurance Company *v.* Massachusetts, 10 Wall., 566; Ward *v.* Maryland, 12 Wall., 418; Slaughterhouse Cases, 16 Wall., 36; Bradwell *v.* The State, 16 Wall., 130; Chemung Bank *v.* Lowery, 93 U. S., 72; McCready *v.* Virginia, 94 U. S., 391; Brown *v.* Houston, 114 U. S., 622; Pembina Mining Co. *v.* Penna., 125 U. S., 181; Kimmish *v.* Ball, 129 U. S., 217; Cole *v.* Cunningham, 133 U. S., 107; Leisy *v.* Hardin, 135 U. S., 100; Minnesota *v.* Barber, 136 U. S., 313, McKane *v.* Durston, 153 U. S., 684; Pittsburgh & So. Coal Co. *v.* Bates, 156 U. S., 577.

[2]A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Holmes *v.* Jennison et al., 14 Pet. 540; Commonwealth of Kentucky *v.* Dennison, governor, 24 How., 66; Taylor *v.* Tainter, 16 Wall., 366; Lascelles *v.* Georgia, 148 U. S., 537; Pearce *v.* Texas, 155 U. S., 311.

[3]No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or labor may be due.

Prigg *v.* The Commonwealth of Pennsylvania, 16 Pet., 539; Jones *v.* Van Zandt, 5 How., 215; Strader et al. *v.* Graham, 10 How., 82; Moore *v.* The People of the State of Illinois, 14 How., 13; Dred Scott *v.* Sanford, 19 How., 393; Ableman *v.* Booth and United States *v.* Booth, 21 How., 506; Callan *v.* Wilson, 127 U. S., 540; Nashville, Chattanooga, etc., Rwy. *v.* Alabama, 128 U. S. 96.

SECTION 3. [1]New States may be admitted by the Congress into this Union; but no new State shall be formed

or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

American Insurance Company et al. *v.* Canter (356 bales cotton), 1 Pet. 511; Pollard's Lessee *v.* Hagan, 3 How. 212; Cross et al. *v.* Harrison, 16 How., 164.

[2]The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

McCullough *v.* State of Maryland, 4 Wh., 316; American Insurance Company *v.* Canter, 1 Pet., 511; United States *v.* Gratiot et al., 14 Pet., 526; United States *v.* Rogers, 4 How., 567; Cross et al. *v.* Harrison, 16 How., 164; Muckey et al. *v.* Coxe, 18 How., 100; Gibson *v.* Chouteau, 13 Wall., 92; Clinton *v.* Englebert, 13 Wall., 434; Beall *v.* New Mexico, 16 Wall., 535; Davis *v.* Beason, 133 U. S., 333; Wisconsin Central R. Rd. Co. *v.* Price County, 133 U. S., 496; Cope *v.* Cope, 137 U. S., 682; Mormon Church *v.* U. S., 136 U. S., 1.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Luther *v.* Borden, 7 How., 1; Texas *v.* White, 7 Wall., 700.

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths

thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Hollingsworth et al. *v.* Virginia, 3 Dallas, 378.

ARTICLE VI.

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Hayburn's Case, 2 Dall., 409; Ware *v.* Hylton, 3 Dall., 199; Calder and Wife *v.* Bull and Wife, 3 Dall., 386; Marbury *v.* Madison, 1 Cr., 137; Chirac *v.* Chirac, 2 Wh., 259; McCulloch *v.* The State of Maryland, 4 Wh., 316; Society *v.* New Haven, 8 Wh., 464; Gibbons *v.* Ogden, 9 Wh., 1; Foster and Elam *v.* Neilson, 2 Pet., 253; Buckner *v.* Finley, 2 Pet., 586; Worcester *v.* State of Georgia, 6 Pet., 515; Kennett et al. *v.* Chambers, 14 How., 38; Lodge *v.* Woolsey, 18 How., 331; State of New York *v.* Dibble, 21 How., 366; Ableman *v.* Booth and United States *v.* Booth, 21 How., 506; Sinnot *v.* Davenport, 22 How., 227; Foster *v.* Davenport, 22 How., 244; Havea *v.* Yaker, 9 Wall., 32; Whitney *v.* Robertson, 124 U. S., 190; In re Neagle, 135 U. S., 1; Cherokee Nation *v.* Kansas Ry. Co., 135 U. S., 641; Cook Co. *v.* Calumet & Chicago Canal Co., 138 U. S. 635; Gulf, Colorado & Santa Fé Rwy. Co. *v.* Hefley, 158 U. S., 98; In re Quarles *v.* Butler, 158 U. S. 532.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no

religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Ex parte Garland, 4 Wall., 333; Davis *v.* Beason, 133 U. S., 333.

ARTICLE VII.

The ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. **In Witness** whereof We have hereunto subscribed our Names,

G° WASHINGTON—
Presidt and deputy from Virginia

New Hampshire.

JOHN LANGDON NICHOLAS GILMAN

Massachusetts.

NATHANIEL GORHAM RUFUS KING

Connecticut.

WM SAML JOHNSON ROGER SHERMAN

New York.

ALEXANDER HAMILTON

New Jersey.

WIL: LIVINGSTON WM PATTERSON
DAVID BREARLEY. JONA: DAYTON

Pennsylvania.

B. Franklin	Thomas Mifflin
Robt. Morris	Geo. Clymer
Thos. Fitzsimons	Jared Ingersoll
James Wilson	Gouv Morris

Delaware.

Geo: Read	Gunning Bedford jun
John Dickinson	Richard Bassett
Jaco: Broom	

Maryland.

James McHenry	Dan: of St Thos Jenifer
Danl Carroll	

Virginia.

John Blair—	James Madison Jr.

North Carolina.

Wm Blount	Richd Dobbs Spaight,
Hu Williamson	

South Carolina.

J. Rutledge	Charles Cotesworth Pinckney
Charles Pinckney	Pierce Butler.

Georgia.

William Few	Abr Baldwin

Attest: WILLIAM JACKSON, *Secretary.*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

[Ellenbecker *v.* Plymouth County, 134 U. S., 3.]

ARTICLE I.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Terret et al. *v.* Taylor et al., 9 Cr., 43; Vidal et al., *v.* Girard et al., 2 How., 127; Ex parte Garland, 4 Wall., 333; United States *v.* Cruikshank et al., 92 U. S., 542; Reynolds *v.* United States, 98 U. S., 145; Davis *v.* Beason, 133 U. S., 333; In re Rapier, 143 U. S., 110; Homer *v.* U. S., 143 U. S., 192.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Presser *v.* Illinois, 116 U. S., 252.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

* The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the first Congress, on the 25th of September, 1789. They were ratified by the following States, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Smith *v.* State of Maryland, 18 How., 71; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How., 272; Ex parte Milligan, 4 Wall., 2; Boyd *v.* United States, 116 U. S., 616; Fong Yuen Ting *v.* U. S., 149 U. S., 698.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States *v.* Perez, 9 Wh., 579; Barron *v.* The City of Baltimore, 7 Pet., 243; Fox *v.* Ohio, 5 How., 410; West River Bridge Company *v.* Dix et al., 6 How., 507; Mitchell *v.* Harmony, 13 How., 115; Moore, ex., *v.* The People of the State of Illinois, 14 How., 13; Murray's Lessee et al. *v.* Hoboken Land and Improvement Company, 18 How., 272; Dynes *v.* Hoover, 20 How., 65; Withers *v.* Buckley et al., 20 How., 84; Gilman *v.* The City of Sheboygan, 2 Black, 510; Ex parte Milligan, 4 Wall., 2; Twitchell *v.* The Commonwealth, 7 Wall., 321; Hepburn *v.* Griswold, 8 Wall., 603; Miller *v.* United States, 11 Wall., 268; Legal Tender Cases, 12 Wall., 457; Pumpelly *v.* Green Bay Company, 13 Wall., 166; Osborn *v.* Nicholson, 13 Wall., 654; Ex parte Lange, 18 Wall., 163; Kohl et al. *v.* United States, 91 U. S., 367; Cole *v.* La Grange, 113 U. S., 1; Ex parte Wilson, 114 U. S., 417; Brown *v.* Grant, 116 U. S., 207; Boyd *v.* United States, 116 U. S., 616; Makin *v.* United States, 117 U. S., 348; Ex parte Bain, 121 U. S., 1; Parkinson *v.* United States, 121 U. S., 281; Spies *v.* Illinois, 123 U. S., 131; Sands *v.* Manistee River Improvement Company, 123 U. S., 288; Mugler *v.* Kansas, 123

U. S., 623; Great Falls Manufacturing Company *v.* The Attorney-General, 124 U. S., 581; United States *v.* De Walt, 128 U. S., 393; Huling *v.* Kaw Valley Railway and Improvement Company, 130 U. S., 559; Freeland *v.* Williams, 131 U. S., 405; Cross *v.* North Carolina, 132 U. S., 131; Manning *v.* French, 133 U. S., 186; Searle *v.* School Dist. No. 2, 133 U. S., 553; Palmer *v.* McMahon, 133 U. S., 660; Ellenbecker *v.* Plymouth County, 134 U. S., 31; Chic., Mil. & St. Paul Rwy. Co. *v.* Minnesota, 134 U. S., 418; Wheeler *v.* Jackson, 137 U. S., 245; Holden *v.* Minnesota, 137 U. S., 245; Caldwell *v.* Texas, 137 U. S., 692; Cherokee Nation *v.* Kansas Ry. Co., 135 U. S., 641; Kaukauna Water Power Co. *v.* Miss. Canal Co., 142 U. S., 254; New Orleans *v.* N. O. Water W'ks, 142 U. S., 79; Counselman *v.* Hitchcock, 142 U. S., 547; Simmonds *v.* U. S., 142 U. S., 148; Horn Silver Mining Co. *v.* N. Y., 143 U. S., 305; Hallinger *v.* Davis, 146 U. S., 314; Shoemaker *v.* U. S., 147 U. S., 282; Thorington *v.* Montgomery, 147 U. S., 490; Yesler *v.* Wash'n Harbor Line Coms'rs, 146 U. S., 646; Monongahela Nav. Co. *v.* U. S., 148 U. S., 312; Fong Yuen Ting *v.* U. S., 149 U. S., 698; In re Lennon, 150 U. S., 393; Pitts., C. C. & St. L. *v.* Backus, 154 U. S., 421; Interstate Com. Comsn. *v.* Brimson, 154 U. S., 447; Pearce *v.* Texas, 155 U. S., 311; Linford *v.* Ellison, 155 U. S., 503; Andrews *v.* Swartz, 156 U. S., 272; Pittsburgh & Southern Coal Co. *v.* La., 156 U. S., 590; St. L. & S. F. Rwy. Co. *v.* Gill, 156 U. S., 649; Johnson *v.* Sayre, 158 U. S., 109; Sweet *v.* Rechel, 159 U. S., 380.

[ARTICLE VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States *v.* Cooledge, 1 Wh., 415; Ex parte Kearney, 7 Wh., 38; United States *v.* Mills, 7 Pet., 142; Barron *v.* City of Baltimore, 7 Pet., 243; Fox *v.* Ohio, 5 How., 410; Withers *v.* Buckley et al., 20 How., 84; Ex parte Milligan, 4 Wall., 2; Twitchell *v.* The Commonwealth, 7 Wall., 321; Miller *v.* The United States, 11 Wall., 268; United States *v.* Cook, 17 Wall., 168; United States *v.* Cruikshank et al., 92 U. S., 542; Spies *v.* Illinois, 123 U. S., 131; Ellenbecker *v.* Plymouth Co., 134 U. S., 31; Jones *v.* U. S., 137 U. S., 202; Cook *v.* U. S., 138 U. S., 157; In re Ross, 140 U. S., 453; Hallinger *v.* Davis, 146 U. S., 314; Mattox *v.* U. S., 156 U. S., 237; Bergemann *v.* Becker, 157 U. S., 655.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States *v.* La Vengeance, 3 Dall., 297; Bank of Columbia *v.* Oakley, 4 Wh., 235; Parsons *v.* Bedford et al., 3 Pet., 433; Lessee of Livingston *v.* Moore et al., 7 Pet., 469; Webster *v.* Reid, 11 How., 437; State of Pennsylvania *v.* The Wheeling, &c., Bridge Company et al., 13 How., 518; The Justices *v.* Murray, 9 Wall. 274; Edwards *v.* Elliott et al., 21 Wall., 532; Pearson *v.* Yewdall, 95 U. S., 294; McElrath *v.* United States, 102 U. S., 426; Callan *v.* Wilson, 127 U. S., 540; Ark. Valley Land and Cattle Co. *v.* Mann, 130 U. S., 69; Whitehead *v.* Shattuck, 138 U. S., 146; Scott *v.* Neely, 140 U. S., 106; Cates *v.* Allen, 149 U. S., 451.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Pervear *v.* Commonwealth, 5 Wall., 475; Manning *v.* French, 133 U. S., 186; Ellenbecker *v.* Plymouth County, 134 U. S., 31; In re Kemmler, 136 U. S., 436; McElvaine *v.* Brush, 142 U. S., 155; O'Neill *v.* Vermont, 144 U. S., 323.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Lessee of Livingston *v.* Moore et al., 7 Pet., 469.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Chisholm, ex., *v.* State of Georgia, 2 Dall., 419; Hollingsworth et al., *v.* The State of Virginia, 3 Dall., 378; Martin *v.* Hunter's Lessee, 1 Wh.,

304; McCulloch *v.* State of Maryland, 4 Wh., 316; Anderson *v.* Dunn, 6 Wh., 204; Cohen *v.* Virginia, 6 Wh., 264; Osborn *v.* United States Bank, 9 Wh., 738; Buchler *v.* Finley, 2 Pet., 586; Ableman *v.* Booth, 21 How., 506; The Collector *v.* Day, 11 Wall., 113; Claflin *v.* Houseman, assignee, 93 U. S., 130; Inman Steamship Company *v.* Tinker, 94 U. S., 238; Church *v.* Kelsey, 121 U. S., 282; Ouachita Packet Co. *v.* Aiken, 121 U. S., 444; W. U. Tel. Co. *v.* Pendleton, 122 U. S., 347; Bowman *v.* Chicago and Northwestern Rwy. Co., 125 U. S., 465; Mahon *v.* Justice, 127 U. S., 700; Leisy *v.* Hardin, 135 U. S., 100; Manchester *v.* Mass., 139 U. S., 240; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.

ARTICLE XI.*

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

State of Georgia *v.* Brailsford et al., 2 Dall., 402; Chisholm, ex., *v.* State of Georgia, 2 Dall., 419; Hollingsworth et al. *v.* Virginia, 3 Dall., 378; Cohen *v.* Virginia, 6 Wh., 264; Osborn *v.* United States Bank, 9 Wh., 738; United States *v.* The Planters' Bank, 9 Wh., 904; The Governor of Georgia *v.* Juan Madrazo, 1 Pet., 110; Cherokee Nation *v.* State of Georgia, 5 Pet., 1; Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet., 257; Curran *v.* State of Arkansas et al., 15 How., 304; New Hampshire *v.* Louisiana, 108 U. S., 76; Virginia Coupon Cases, 114 U. S., 270; Hagood *v.* Southern, 117 U. S., 52; In re Ayres, 123 U. S., 443; Lincoln County *v.* Luning, 133 U. S., 529; Coupon Cases, 135 U. S., 662; Pennoyer *v.* McConnaughy, 140 U. S., 1; In re Taylor, 149 U. S., 164; Reagan *v.* Farmers' Loan and Trust Co., 154 U. S., 362; Reagan *v.* Mercantile Trust Co., 154 U. S., 413.

ARTICLE XII.†

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of

* The eleventh amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Third Congress, on the 5th of March, 1794; and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the States.

† The twelfth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the States.

whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the person having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.*

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Dred Scott *v.* Sanford, 19 How., 393; White *v.* Hart, 13 Wall., 646; Osborn *v.* Nicholson, 13 Wall., 654; Slaughterhouse Cases, 16 Wall., 36; Ex parte Virginia, 100 U. S., 339; Civil Rights Case, 109 U. S., 3.

ARTICLE XIV.†

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

* The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States, viz: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

† The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore *Resolved*, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (and the legislature of the

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Strauder *v.* West Virginia, 100 U. S., 303; Virginia *v.* Rivers, 100 U. S., 313; Ex parte Virginia, 100 U. S., 339; Missouri *v.* Lewis, 101 U. S., 22; Civil Rights Cases, 109 U. S., 3; Louisiana *v.* New Orleans, 109 U. S., 285; Hurtado *v.* California, 110 U. S., 516; Hagar *v.* Reclamation Dist., 111 U. S., 701; Elk *v.* Wilkins, 112 U. S., 94; Head *v.* Amoskeag Mfg. Co., 113 U. S., 9; Barbier *v.* Connolly, 113 U. S., 27; Provident Institution *v.* Jersey City, 113 U. S., 506; Soon Hing *v.* Crowley, 113 U. S., 703; Wurts *v.* Hoagland, 114 U. S., 606; Ky. R. Rd. Tax Cases, 115 U. S., 321; Campbell *v.* Holt, 115 U. S., 620; Presser *v.* Illinois, 116 U. S., 252; Stone *v.* Farmers' Loan and Trust Co., 116 U. S., 307; Arrowsmith *v.* Harmoning, 118 U. S., 194; Yick Wo *v.* Hopkins, 118 U. S., 356; Santa Clara Co. *v.* S. Pacific R. Rd., 118 U. S., 394; Phila. Fire Assn. *v.* N. Y., 119 U. S., 110; Schmidt *v.* Cobb, 119 U. S., 286; Baldwin *v.* Frank, 119 U. S., 678; Hayes *v.* Missouri, 120 U. S., 68; Church *v.* Kelsey, 121 U. S., 282; Pembina Mining Co. *v.* Penna., 125 U. S., 181; Spencer *v.* Merchant, 125 U. S., 345; Dow *v.* Beidelman, 125 U. S., 680; Bank of Redemption *v.* Boston, 125 U. S., 60; Ro Bards *v.* Lamb, 127 U. S., 58; Mo. Pac. Rwy. Co. *v.* Mackey, 127 U. S., 205; Minneapolis and St. Louis Rwy. *v.* Herrick, 127 U. S., 210; Powell *v.* Penna., 127 U. S., 678; Kidd *v.* Pearson, 128 U. S., 1; Nashville, Chattanooga, &c., Rwy. *v.* Alabama, 128 U. S., 96; Walston *v.* Navin, 128 U. S., 578; Minneapolis and St. Louis Rwy. *v.* Beckwith, 129 U. S., 26; Dent *v.* West Va. 129 U. S., 114; Huling *v.*

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same State passed a resolution in April, 1868, to withdraw its consent to it); Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867 (and the legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it); Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 20, 1867; Minnesota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868, and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified it October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware February 8, 1867; by Maryland March 23, 1867, and was not afterwards ratified by either State.

Kaw Valley Rwy. and Improvement Co., 130 U. S., 559; Freeland *v.* Williams, 131 U. S., 405; Cross *v.* North Carolina, 132 U. S., 131; Pennie *v.* Reis, 132 U. S., 464; Sugg *v.* Thornton, 132 U. S., 524; Davis *v.* Beason, 133 U. S., 333; Ellenbecker *v.* Plymouth Co., 134 U. S., 31; Bell Gap R. Rd. Co. *v.* Penna., 134 U. S., 232; Chicago, Milwaukee & St. Paul Rwy. *v.* Minnesota, 134 U. S., 418; Home Ins. Co. *v.* N. Y., 134 U. S., 594; Louisville & Nashville R. Rd. Co. *v.* Woodson, 134 U. S., 614; Home Ins. Co. *v.* N. Y., 134 U. S., 594; Leisy *v.* Hardin, 135 U. S., 100; In re Kemmler, 136 U. S., 436; York *v.* Texas, 137 U. S., 15; Crowley *v.* Christensen, 137 U. S., 89; Wheeler *v.* Jackson, 137 U. S., 245; Holden *v.* Minnesota, 137 U. S., 483; In re Converse, 137 U. S., 624; Caldwell *v.* Texas, 137 U. S., 692; Kauffman *v.* Wootters, 138 U. S., 285; Lesper *v.* Texas, 139 U. S., 462; In re Manning, 139 U. S., 504; Mabal *v.* Louisiana, 139 U. S., 621; In re Duncan, 139 U. S., 449; In re Shibuya Jugiro, 139 U. S., 291; Lent *v.* Tillson, 140 U. S., 316; New Orleans *v.* N. O. Water W'ks, 142 U. S., 79; McElvaine *v.* Brush, 142 U. S., 155; Kaukauna Water Power Co. *v.* Miss. Canal Co., 142 U. S., 254; Charlotte, Augusta & Col. R. Rd. Co. *v.* Gibbes, 142 U. S., 386; Pacific Ex. Co. *v.* Siebert, 142 U. S., 339; Horn Silver Mining Co. *v.* N. Y., 143 U. S., 305; Budd *v.* N. Y., 143 U. S., 517; Schwab *v.* Berggren, 143 U. S., 442; Fielden *v.* Illinois, 143 U. S., 452; N. Y. *v.* Squire, 144 U. S., 175; Brown *v.* Smart, 144 U. S., 454; McPherson *v.* Blacker, 146 U. S., 1; Morley *v.* Lake Shore & Mich. Southern Ry. Co., 146 U. S., 162; Hallinger *v.* Davis, 146 U. S., 314; Yesler *v.* Washington Harbor Line Comsrs., 146 U. S., 646; Butler *v.* Goreley, 146 U. S., 303; Southern Pacific Co. *v.* Denton, 146 U. S., 202; Thorington *v.* Montgomery, 147 U. S., 490; Giozza *v.* Tiernan, 148 U. S., 657; Paulsen *v.* Portland, 149 U. S., 30; Minn. & St. L. Rwy. Co. *v.* Emmons, 149 U. S., 364; Columbus So. Rwy. Co. *v.* Wright, 151 U. S., 470; In re Frederick, 149 U. S., 70; McNulty *v.* Calif., 149 U. S., 645; Lees *v.* U. S., 150 U. S., 476; Lawton *v.* Steele, 152 U. S., 133; Montana Co. *v.* St. Louis Mining Co., 152 U. S., 160; Duncan *v.* Missouri, 152 U. S., 377; McKane *v.* Durston, 153 U. S., 684; Marchant *v.* Penna. R. R. Co., 153 U. S., 380; Brass *v.* Stoeser, 153 U. S., 391; Scott *v.* McNeal, 154 U. S., 34; Reagan *v.* Far.[s]Loan & Trust Co., 154 U. S., 362; P., C., C. & St. L. R. R. Co., *v.* Backus, 154 U. S., 421; Interstate Com. Comsn. *v.* Brimson, 154 U. S., 447; Reagan *v.* Mercantile Trust Co., 154 U. S., 447; Pearce *v.* Texas, 155 U. S., 311; Pittsburgh & So. Coal Co. *v.* La., 156 U. S., 590; Andrews *v.* Swartz, 156 U. S., 272; St. L. & S. F. Rwy. Co. *v.* Gill, 156 U. S., 649; Stevens admr. *v.* Nichols, 157 U. S., 370; Bergemann *v.* Becker, 157 U. S., 655; Quarles *v.* Butler, 158 U. S., 532; Gray *v.* Connecticut, 159 U. S., 74; Central Land Co. *v.* Laidley, 159 U. S., 103; Moore *v.* Missouri, 159 U. S., 673; Winona & St. Peter Land Co. *v.* Minn. 159 U. S., 528.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a

State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, or as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Crandall *v.* the State of Nevada, 6 Wall., 35; Paul *v.* Virginia, 8 Wall., 168; Ward *v.* Maryland, 12 Wall., 418; Slaughterhouse Cases, 16 Wall., 36; Bradwell *v.* The State, 16 Wall., 130; Bartemeyer *v.* Iowa, 18 Wall., 129; Minor *v.* Happersett, 21 Wall., 162; Walker *v.* Sauvinet, 92 U. S., 90; Kennard *v.* Louisiana, ex rel. Morgan, 92 U. S., 480; United States *v.* Cruikshank, 92 U. S., 542; Munn *v.* Illinois, 94 U. S., 113.

ARTICLE XV.*

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude —

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

United States *v.* Reese et al., 92 U. S., 214; United States *v.* Cruikshank et al., 92 U. S., 542; Ex parte Yarborough, 110 U. S., 651; McPherson *v.* Blacker, 146 U. S., 1.

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* The fifteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Fortieth Congress on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: From North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9–12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13–14, 1869; New York, March 17–April 14, 1869 (and the legislature of the same State passed a resolution January 5, 1870, to withdraw its consent to it); New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15–17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18–19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The State of Georgia also ratified the amendment February 2, 1870.

RATIFICATIONS OF THE CONSTITUTION.

The Constitution was adopted by a convention of the States September 17, 1787, and was subsequently ratified by the several States, in the following order, viz:

Delaware, December 7, 1787.
Pennsylvania, December 12, 1787.
New Jersey, December 18, 1787.
Georgia, January 2, 1788.
Connecticut, January 9, 1788.
Massachusetts, February 6, 1788.
Maryland, April 28, 1788.
South Carolina, May 23, 1788.
New Hampshire, June 21, 1788.
Virginia, June 26, 1788.
New York, July 26, 1788.
North Carolina, November 21, 1789.
Rhode Island, May 29, 1790.

The State of Vermont, by convention, ratified the Constitution on the 10th of January, 1791, and was, by an act of Congress of the 18th of February, 1791, "received and admitted into this Union as a new and entire member of the United States of America."

RATIFICATIONS OF THE AMENDMENTS TO THE CONSTITUTION.

The first ten of the preceding articles of amendment (with two others which were not ratified by the requisite number of States) were submitted to the several State legislatures by a resolution of Congress which passed on the 25th of September, 1789, at the first session of the

First Congress, and were ratified by the legislatures of the following States:

New Jersey, November 20, 1789.
Maryland, December 19, 1789.
North Carolina, December 22, 1789.
South Carolina, January 19, 1790.
New Hampshire, January 25, 1790.
Delaware, January 28, 1790.
Pennsylvania, March 10, 1790.
New York, March 27, 1790.
Rhode Island, June 15, 1790.
Vermont, November 3, 1791.
Virginia, December 15, 1791.

The acts of the legislatures of the States ratifying these amendments were transmitted by the governors to the President, and by him communicated to Congress. The legislatures of Massachusetts, Connecticut, and Georgia do not appear by the record to have ratified them.

The eleventh article was submitted to the legislatures of the several States by a resolution of Congress passed on the 5th of March, 1794, at the first session of the Third Congress; and on the 8th of January, 1798, at the second session of the Fifth Congress, it was declared by the President, in a message to the two Houses of Congress, to have been adopted by the legislatures of three-fourths of the States, there being at that time sixteen States in the Union.

The twelfth article was submitted to the legislatures of the several States, there being then seventeen States, by a resolution of Congress passed on the 12th of December, 1803, at the first session of the Eighth Congress, and was ratified by the legislatures of three-fourths of the States in 1804, according to a proclamation of the Secretary of State dated the 25th of September, 1804.

The thirteenth article was submitted to the legislatures of the several States, there being then thirty-six States, by a resolution of Congress passed on the 1st of February, 1865, at the second session of the Thirty-eighth Congress,

and was ratified, according to a proclamation of the Secretary of State dated December 18, 1865, by the legislatures of the following States:

Illinois, February 1, 1865.
Rhode Island, February 2, 1865.
Michigan, February 2, 1865.
Maryland, February 3, 1865.
New York, February 3, 1865.
West Virginia, February 3, 1865.
Maine, February 7, 1865.
Kansas, February 7, 1865.
Massachusetts, February 8, 1865.
Pennsylvania, February 8, 1865.
Virginia, February 9, 1865.
Ohio, February 10, 1865.
Missouri, February 10, 1865.
Indiana, February 16, 1865.
Nevada, February 16, 1865.
Louisiana, February 17, 1865.
Minnesota, February 23, 1865.
Wisconsin, March 1, 1865.
Vermont, March 9, 1865.
Tennessee, April 7, 1865.
Arkansas, April 20, 1865.
Connecticut, May 5, 1865.
New Hampshire, July 1, 1865.
South Carolina, November 13, 1865.
Alabama, December 2, 1865.
North Carolina, December 4, 1865.
Georgia, December 9, 1865.

The following States not enumerated in the proclamation of the Secretary of State also ratified this amendment:

Oregon, December 11, 1865.
California, December 20, 1865.
Florida, December 28, 1865.
New Jersey, January 23, 1866.
Iowa, January 24, 1866.
Texas, February 18, 1870.

Mississippi rejected the amendment, December 4, 1865; Kentucky, February 22, 1865; Delaware, February 7, 1867; Maryland, March 23, 1867.

The fourteenth article was submitted to the legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 16th of June, 1866, at the first session of the Thirty-ninth Congress, and was ratified, according to a proclamation of the Secretary of State dated July 28, 1868, by the legislatures of the following States:

Connecticut, June 30, 1866.
New Hampshire, July 7, 1866.
Tennessee, July 19, 1866.
* New Jersey, September 11, 1866.
† Oregon, September 19, 1866.
Vermont, November 9, 1866.
New York, January 10, 1867.
‡ Ohio, January 11, 1867.
Illinois, January 15, 1867.
West Virginia, January 16, 1867.
Kansas, January 18, 1867.
Maine, January 19, 1867.
Nevada, January 22, 1867.
Missouri, January 26, 1867.
Indiana, January 29, 1867.
Minnesota, February 1, 1867.
Rhode Island, February 7, 1867.
Wisconsin, February 13, 1867.
Pennsylvania, February 13, 1867.
Michigan, February 15, 1867.
Massachusetts, March 20, 1867.
Nebraska, June 15, 1867.
Iowa, April 3, 1868.
Arkansas, April 6, 1868.
Florida, June 9, 1868.

* New Jersey withdrew her consent to the ratification March 27, 1868.
† Oregon withdrew her consent to the ratification October 15, 1868.
‡ Ohio withdrew her consent to the ratification January 15, 1868.

* North Carolina, July 4, 1868.
Louisiana, July 9, 1868.
* South Carolina, July 9, 1868.
Alabama, July 13, 1868.
* Georgia, July 21, 1868.

* The State of Virginia ratified this amendment on the 8th of October, 1869; Mississippi, January 17, 1870; Texas, February 18, 1870, — subsequent to the date of the proclamation of the Secretary of State.

The States of Delaware, Maryland and Kentucky, rejected the amendment.

The fifteenth article was submitted to the legislatures of the several States, there being then thirty-seven States, by a resolution of Congress passed on the 27th of February, 1869, at the first session of the Forty-first Congress; and was ratified, according to a proclamation of the Secretary of State dated March 30, 1870, by the legislatures of the following States:

Nevada, March 1, 1869.
West Virginia, March 3, 1869.
North Carolina, March 5, 1869.
Louisiana, March 5, 1869.
Illinois, March 5, 1869.
Michigan, March 8, 1869.
Wisconsin, March 9, 1869.
Massachusetts, March 12, 1869.
Maine, March 12, 1869.
South Carolina, March 16, 1869.
Pennsylvania, March 26, 1869.
Arkansas, March 30, 1869.
† New York, April 14, 1869.
Indiana, May 14, 1869.
Connecticut, May 19, 1869.
Florida, June 15, 1869.
New Hampshire, July 7, 1869.
Virginia, October 8, 1869.

* North Carolina, South Carolina, Georgia, and Virginia had previously rejected the amendment.

† New York withdrew her consent to the ratification January 5, 1870.

Vermont, October 21, 1869.
Alabama, November 24, 1869.
Missouri, January 10, 1870.
Mississippi, January 17, 1870.
Rhode Island, January 18, 1870.
Kansas, January 19, 1870.
* Ohio, January 27, 1870.
Georgia, February 2, 1870.
Iowa, February 3, 1870.
Nebraska, February 17, 1870.
Texas, February 18, 1870.
Minnesota, February 19, 1870.

† The State of New Jersey ratified this amendment on the 21st of February, 1871, subsequent to the date of the proclamation of the Secretary of State.

The States of California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected this amendment.

* Ohio had previously rejected the amendment May 4, 1869.
† New Jersey had previously rejected the amendment.

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Protection of the laws. No State shall deny to any person within its jurisdiction the equal. [Amendments]	14	1	—	380
Public debt of the United States incurred in suppressing insurrection or rebellion shall not be questioned. The validity of the. [Amendments]	14	4	—	383
Public safety may require it. The writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the	1	9	2	357
Public trial by jury. In all criminal prosecutions the accused shall have a speedy and. [Amendments]	6	—	—	376
Public use. Private property shall not be taken for, without just compensation. [Amendments]	5	—	—	375
Punishment according to law. Judgment in cases of impeachment shall not extend further than to removal from, and disqualification for, office; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and	1	3	7	349
Punishments inflicted. Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual. [Amendments]	8	—	—	377

Q.

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Of its own members. Each House shall be the judge of the election, returns, and	1	5	1	350
Of the President. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be elegible to the office of President	2	1	4	362
Neither shall any person be eligible to the office of President who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States	2	1	4	362
Of the Vice-President. No person constitutionally ineligible to the office of President shall be eligible to that of Vice-President. [Amendments]	12	—	—	378

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Quartered in any house without the consent of the owner in time of peace. No soldier shall be. [Amendments]	3	—	—	374
Quorum to do business. A majority of each House shall constitute a	1	5	1	350
But a smaller number than a quorum may adjourn from day to day, and may be authorized to compel the attendance of absent members	1	5	1	350
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Quorum to elect a Vice-President by the Senate. Two-thirds of the whole number of Senators shall be a. [Amendments]	12	—	—	378
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R.

Race, color, or previous condition of servitude. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of. [Amendments]	15	1	—	384
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Ratio. But when the right to vote for Presidential electors or members of Congress, or the legislative, executive, and judicial officers of the State, except for engaging in rebellion or other crime, shall be denied or abridged by a State, the basis of representation shall be reduced therein in the proportion of such denial or abridgment of the right to vote. [Amendments]	14	2	—	382
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Religion or prohibiting the free exercise thereof. Congress shall make no law respecting the establishment of. [Amendments]	1	—	—	374
Religious test shall ever be required as a qualification for any office or public trust under the United States. No	6	—	3	371
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Representation and direct taxation, how apportioned among the several States. [This provision is changed by the fourteenth amendment, section 2, page 382]	1	2	3	348
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Representation among the several States shall be according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The ratio of. [Amendments]	14	2	—	382
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And direct taxes, how apportioned among the several States. [Amended by fourteenth amendment, section 2, page 382]	1	2	3	348
Shall choose their Speaker and other officers. The House of	1	2	5	348
Shall have the sole power of impeachment. The House of	1	2	5	348
Executives of the State shall issue writs of election to fill vacancies in the House of	1	2	4	348
The times, places, and manner of choosing Representatives shall be prescribed by the legislatures of the States	1	4	1	349
But Congress may at any time by law make or alter such regulations except as to the places of choosing Senators	1	4	1	349
And Senators shall receive a compensation to be ascertained by law	1	6	1	350
Shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during attendance at the session of the House, and in going to and returning from the same	1	6	1	350
Shall not be questioned in any other place for				

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No person holding any office under the United States shall, while holding such office, be a member of the House of	1	6	2	351
All bills for raising revenue shall originate in the House of	1	7	1	351
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Reserved rights of the States and the people. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. [Amendments]	9	—	—	377
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. [Amendments]	10	—	—	377
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Resignation, or inability of the President. Congress may by law provide for the case of the removal, death	2	1	5	363
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Rights in the Constitution shall not be construed to deny or disparage others retained by the people. The enumeration of certain. [Amendments]	9	—	—	377
Rights not delegated to the United States nor prohibited to the States are reserved to the States respectively or to the people. [Amendments]	10	—	—	377
Rules of its proceedings. Each House may determine the	1	5	2	350
Rules and regulations respecting the territory or other property of the United States. Congress shall dispose of and make all needful	7	3	2	370
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S.

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Searches and seizures. And no warrants shall be issued but upon probable cause, on oath or affirmation, describing the place to be searched and the person or things to be seized. [Amendments]	4	—	—	375
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Senate and House of Representatives. The Congress of the United States shall consist of a	1	1	—	347
Senate of the United States. The Senate shall be composed of two Senators from each State, chosen by the legislature for six years	1	3	1	348
If vacancies happen during the recess of the legislature of a State, the executive thereof may make temporary appointments until the next meeting of the legislature	1	3	2	349
The Vice-President shall be President of the Senate, but shall have no vote unless the Senate be equally divided	1	3	4	349
The Senate shall choose their other officers, and also a President pro tempore in the absence of the Vice-President or when he shall exercise the office of President	1	3	5	349
The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation	1	3	6	349
When the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present	1	3	6	349
It shall be the judge of elections, returns, and qualifications of its own members	1	5	1	350
A majority shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members	1	5	1	350
It may determine the rules of its proceedings, punish a member for disorderly behavior, and with the concurrence of two-thirds expel a member	1	5	2	350
It shall keep a journal of its proceedings, and from time to time publish the same, except such parts as may in their judgment require secrecy	1	5	3	350
It shall not adjourn for more than three days during a session without the consent of the other House	1	5	4	350
It may propose amendments to bills for raising revenue, but such bills shall originate in the House of Representatives	1	7	1	351
The Senate shall advise and consent to the ratification of all treaties, provided two-thirds of the members present concur	2	2	2	364
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No State, without its consent, shall be deprived of its equal suffrage in the Senate	5	—	—	370
Senators shall, immediately after assembling, under their first election, be divided into three classes, so that the seats of one-third shall become vacant at the expiration of every second year .	1	3	2	349
No person shall be a Senator who shall not be thirty years of age, nine years a citizen of the United States, and an inhabitant when elected of the State for which he shall be chosen . .	1	3	3	349
The times, places, and manner of choosing Senators may be fixed by the legislature of a State, but Congress may by law make or altar such regulations except as to the places of choosing	1	4	1	349
If vacancies happen during the recess of the legislature of a State, the executive thereof may make temporary appointments until the next meeting of the legislature	1	3	2	349
They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of the Senate and in going to and returning from the same	1	6	1	350
Senators and Representatives shall receive a compensation to be ascertained by law	1	6	1	350
Senators and Representatives shall not be questioned for any speech or debate in either House in any other place	1	6	1	350
No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the United States which shall have been created, or of which the emoluments shall have been increased, during such term	1	6	2	351
No person holding any office under the United States shall be a member of either House during his continuance in office	1	6	2	351
No Senator or Representative or person holding an office of trust or profit under the United States shall be an elector for President and Vice-President	2	1	2	361
Senators and Representatives shall be bound by an oath or affirmation to support the Constitution .	6	—	3	371
No person shall be a Senator or Representative who having, as a Federal or State officer, taken an oath to support the Constitution, afterwards engaged in rebellion against the United States. [Amendments]	14	3	—	383
But Congress may, by a vote of two-thirds of each House, remove such disability. [Amendments]	14	3	—	383

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Service or labor in one State, escaping into another State, shall be delivered up to the party to whom such service or labor may be due. Fugitives from	4	2	3	369
Servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States or any place subject to their jurisdiction. Neither slavery nor involuntary. [Amendments]	13	1	—	380
Servitude. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of. [Amendments]	15	1	—	384
Ships of war in time of peace, without the consent of Congress. No State shall keep troops or	1	10	3	361
Silver coin a tender in payment of debts. No State shall make anything but gold and	1	10	1	358
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Slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any places subject to their jurisdiction. Neither. [Amendments]	13	1	—	380
Soldiers shall not be quartered, in time of peace, in any house without the consent of the owner. [Amendments]	3	—	—	374
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Speech or of the Press. Congress shall make no law abridging the freedom of. [Amendments]	1	—	—	374
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Standard of weights and measures. Congress shall fix the	1	8	5	354
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State legislatures, and all executive and judicial officers of the United States, shall take an oath to support the Constitution. All members of the several	6	—	3	371
States. When vacancies happen in the representation from any State, the executive authority shall issue writs of election to fill such vacancies	1	2	4	348
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Shall not grant letters of marque and reprisal	1	10	1	358
Shall not coin money	1	10	1	358
Shall not emit bills of credit	1	10	1	358
Shall not make anything but gold and silver coin a tender in payment of debts	1	10	1	358
Shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts	1	10	1	358
Shall not grant any title of nobility	1	10	1	358
Shall not, without the consent of Congress lay any duties on imports or exports, except what may be absolutely necessary for executing its inspection laws	1	10	2	360
Shall not, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay	1	10	3	361
Full faith and credit in every other State shall be given to the public acts, records, and judicial proceedings of each State	4	1	—	368
Congress shall prescribe the manner of proving such acts, records, and proceedings	4	1	—	368
Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States	4	2	1	369
New States may be admitted by Congress into this Union	4	3	1	369
But no new State shall be formed or erected within the jurisdiction of another State	4	3	1	369
Nor any State formed by the junction of two or more States or parts of States without the consent of the legislatures as well as of Congress	4	3	1	369
No State shall be deprived, without its consent, of its equal suffrage in the Senate	5	—	—	370
Three-fourths of the legislatures of the States or conventions of three-fourths of the States, as Congress shall prescribe, may ratify amendments to the Constitution	5	—	—	370
The United States shall guarantee a republican form of government to every State in the Union	4	4	—	370
They shall protect each State against invasion	4	4	—	370
And on application of the legislature, or the executive [when the legislature can not be convened], against domestic violence	4	4	—	370
The ratification by nine States shall be sufficient to establish the Constitution between the States so ratifying the same	7	—	—	372
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States or to the people. Powers not delegated to the United States, nor prohibited to the States, are reserved to the. [Amendments]	10	—	—	377
Suffrage in the Senate. No State shall be deprived without its consent of its equal	5	—	—	370
Suits at common law, where the value in controversy shall exceed twenty dollars, shall be tried by jury. [Amendments]	7	—	—	377
In law or equity against one of the States by citizens of another State or by citizens of a foreign State. The judicial power of the United States shall not extend to. [Amendments]	11	—	—	378
Supreme Court. Congress shall have power to constitute tribunals inferior to the	1	8	9	355
Supreme Court, and such inferior courts as Congress may establish. The judicial power of the United States shall be vested in one	3	1	—	365
The judges of the Supreme and inferior courts shall hold their offices during good behavior .	3	1	—	365
The compensation of the judges shall not be diminished during their continuance in office	3	1	—	365
Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and in which a State may be a party. The	3	2	2	367
Shall have appellate jurisdiction, both as to law and fact, with such exceptions and regulations as Congress may make. The	3	2	2	367
Supreme law of the land. This Constitution, the laws made in pursuance thereof, and the treaties of the United States shall be the	6	—	2	371
The judges in every State shall be bound thereby	6	—	2	371
Suppress insurrections, and repel invasions. Congress shall provide for calling forth the militia to execute the laws	1	8	15	355
Suppression of insurrection or rebellion, shall not be questioned. The public debt, including the debt for pensions and bounties incurred in the. [Amendments]	14	4	—	383

T.

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Tax or duty shall be laid on articles exported from any State. No	1	9	5	357

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Taxes, duties, imposts, and excises. Congress shall have power to lay	1	8	1	351
They shall be uniform throughout the United States	1	8	1	351
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Tender in payment of debts. No State shall make anything but gold and silver coin a	1	10	1	358
Term of four years. The President and Vice-President shall hold their offices for the	2	1	1	361
Term for which he is elected. No Senator or Representative shall be appointed to any office under the United States which shall have been created or its emoluments increased during the	1	6	2	351
Territory or other property of the United States. Congress shall dispose of and make all needful rules and regulations respecting the	4	3	2	370
Test as a qualification for any office or public trust shall ever be required. No religious	6	—	3	371
Testimony of two witnesses to the same overt act, or on confession in open court. No person shall be convicted of treason except on the	3	3	1	368
Three-fourths of the legislatures of the States, or conventions in three-fourths of the States, as Congress shall prescribe, may ratify amendments to the Constitution	5	—	—	370
Tie. The Vice-President shall have no vote unless the Senate be equally divided	1	3	4	349
Times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof	1	4	1	349
But Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators	1	4	1	349
Title of nobility. The United States shall not grant any	1	9	8	358
No State shall grant any	1	10	1	358
Title of any kind, from any king, prince, or foreign State, without the consent of Congress. No person holding any office under the United States shall accept of any	1	9	8	358
Tonnage without the consent of Congress. No State shall lay any duty of	1	10	3	361
Tranquillity, provide for the common defense, etc. To insure domestic. [Preamble]	—	—	—	347
Treason shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort	3	3	1	368

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Treason. No person shall, unless on the testimony of two witnesses to the same overt act, or on confession in open court, be convicted of	3	3	1	368
Congress shall have power to declare the punishment of	3	3	2	368
Shall not work corruption of blood. Attainder of	3	3	2	368
Shall not work forfeiture, except during the life of the person attainted. Attainder of	3	3	2	368
Treason, bribery, or other high crimes and misdemeanors. The President, Vice-President, and all civil officers shall be removed from office on impeachment for and conviction of	2	4	—	365
Treason, felony, and breach of the peace. Senators and Representatives shall be privileged from arrest while attending or while going to or returning from the sessions of Congress, except in cases of	1	6	1	350
Treasury, but in consequence of appropriations made by law. No money shall be drawn from the .	1	9	7	358
Treaties. The President shall have power, with the advice and consent of the Senate, provided two-thirds of the Senators present concur, to make	2	2	2	364
The judicial power shall extend to all cases arising under the Constitution, laws, and	3	2	1	365
They shall be the supreme law of the land, and the judges in every State shall be bound thereby	6	—	2	371
Treaty, alliance, or confederation. No State shall enter into any	1	10	1	358
Trial, judgment, and punishment according to law. Judgment in cases of impeachment shall not extend further than to removal from and disqualification for office; but the party convicted shall nevertheless be liable and subject to indictment	1	3	7	349
Trial by jury. All crimes, except in cases of impeachment, shall be tried by jury	3	2	3	367
Such trial shall be held in the State within which the crime shall have been committed	3	2	3	367
But when not committed within a State, the trial shall be at such place as Congress may by law have directed	3	2	3	367
In all criminal prosecutions the accused shall have a speedy and public. [Amendments]	6	—	—	376
Suits at common law, when the amount exceeds twenty dollars, shall be by. [Amendments] .	7	—	—	377
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Trust and Profit under the United States shall be an elector for President and Vice-President. No Senator, Representative, or person holding any office of	2	1	2	361

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Two-thirds of the members present. No person shall be convicted on impeachment without the concurrence of	1	3	6	349
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